STATE OF MICHIGAN

SUPREME COURT

Appeal from the Michigan Court of Appeals
[Kelly (M.J.), PJ., Cavanagh and Servitto, JJ.]

KIMBERLY MARIE MARIK,

Plaintiff/Appellee

-vs-

PETER BRIAN MARIK,

Defendant/Appellant.

MSC No 154549

COA No 333687
L/C No 2011-0651-DM
Hon. Kathryn A. George

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APPELLEE'S SUPPLEMENTAL BRIEF

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QUESTION PRESENTED BY THIS COURT

Whether the Macomb Circuit Court's June 13, 2016 order denying the defendant father's motion to change the children's school enrollment and to modify parenting time was "a postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii)?

Plaintiff/Appellee:	No
Trial Court:	Did not address
Court of Appeals:	No

INTRODUCTION

To affect a custody right, either physical or legal, is to alter or change it in some way. When parents with joint legal custody cannot agree on an important decision concerning their children and ask the court to make the decision for them, there is no effect on legal custody. The parents had joint legal custody before turning to the court and they have joint legal custody after the court rules. There is no change, no alteration of their legal rights. The court's resolution of the particular issue is not an order affecting the custody of a minor.

In this case, Defendant/Appellant Peter Brian Marik ("Father") is proceeding on two fronts, asking this Court to rule that the denial of his school-change motion is appealable of right and asking the Court of Appeals—in a delayed application, COA No 336087—to rule that the trial court erred in denying that motion. The delayed application may or may not be denied before this Court conducts its MOAA hearing on the jurisdictional question, but the jurisdictional question still is likely to command consideration by this Court, because of the published holding in *Ozimek v Rodgers*, _____ Mich App ___, 2016 WL 4482938 (2016) (Tab A), which is being heard at the same time.

There is a delayed application on the merits pending below in *Ozimek* too, but a denial there will not affect the binding precedent established in *Ozimek* and in *Madson v Jaso*, _____ Mich App _____, 2016 WL 4482946 (2016) (Tab B), both of which were remanded by this Court to the Court of Appeals for the very purpose of answering the jurisdictional question that the Court will now consider itself (as the Court of Appeals requested in *Ozimek*, Tab A at 5). On February 3, when the Court ordered this MOAA in

both *Ozimek* and *Marik*, it ordered that *Madson* be held in abeyance pending the outcome.

The Court of Appeals reached the right result in the *Ozimek* and *Madson* opinions on remand. Those opinions settle the question under MCR 7.215(J)(1). This brief, submitted by Plaintiff/Appellee Kimberly Marie Marik ("Mother"), first suggests a different analysis—summarized above—that achieves the same result in virtually all cases, including the two before this Court. Then it summarizes a "plain language" defense of the *Ozimek/Madson* analysis. Finally, it explains the many reasons why the *Ozimek* result is better policy and practice.

One practical point—ignored by those who advocate for appeals of right from every order that merely relates to or touches on the exercise of the legal custody right—is that these are usually very time-sensitive issues that must be decided on an expedited basis. Decisions about matters like school choice or medical treatment often require appellate review in a matter of weeks or less. Emergency appeals with motions for immediate consideration and requests for peremptory reversal look the same and are handled virtually the same whether they are appeals of right or applications for leave. The real-world consequence of limiting postjudgment appeals of right to orders that actually alter or a change a custody right will be to discourage the knee-jerk filing of ill-considered claims of appeal. When the first appellate filing needs to be a thought-out legal brief and not just a piece of paper, the wheat is more likely to separate from the chaff. Moreover, review of the merits is more likely to happen sooner, when it is needed.

This Court should deny leave or rule that there is no appeal of right from a post-judgment order unless the relief requested would alter or change—*i.e.*, affect—the parties' custody rights.

ABBREVIATED FACTUAL BACKGROUND

Mother provided a fuller counter-statement of facts in her response to Father's application for leave to appeal. That statement is condensed here.

A. The Judgment of Divorce

The parties were divorced in 2011 when they agreed to a consent judgment (the "Judgment"), which granted them joint legal and joint physical custody of their twin sons, born in 2007. The children's "primary residence" is with Mother (Judgment at 3). In the years since the divorce, Father—through various attorneys—has filed several motions, two of them relevant here.

B. First School Motion

In July 2012, before the children started kindergarten, Father sought to have them attend the school of his choice, rather than the school Mother had chosen ("First School Motion"). Mother lived (and lives) in Farmington Hills, and had enrolled the boys in the public school assigned to her home, Kenbrook Elementary School in Farmington Hills. Father lived in Waterford but sought to have the boys attend Oak Ridge Elementary School, a public school in Royal Oak, where neither parent lived. Father argued that Royal Oak was more convenient than Farmington Hills based on where the parties lived and worked (First School Motion at ¶13). During the school year, Father has parenting time 6 out of 14 nights, 4 of which are school nights and Mother has parenting time 8 out of 14 nights, 6 of which are school nights (Judgment at 3-4). Father claimed that the Royal Oak school would provide a better education (First School Motion, ¶15).

After a hearing, the Friend of Court referee issued a recommended order that the children attend Kenbrook. Father timely objected. On August 27, 2012, the court held a de novo hearing and set the matter for further evidentiary hearing before the referee and also held that in the interim, the children would begin school in the Farmington Hills School District at Kenbrook (Order dated August 27, 2012). On October 12, four days before the scheduled evidentiary hearing, Father stipulated to cancel the hearing and withdrew his objections to the recommended order.[1] Mother maintains—and the court found in 2016—that the children have been thriving at Kenbrook, the only school they have ever attended. At this writing they are more than half way through fourth grade.

C. Second School Motion

In 2016 Father hired yet another attorney and again sought to have the children's school changed, in a motion that also sought a modification in parenting time to facilitate the desired school change ("Second School Motion"). Since the divorce, Father has had the children about 45% of the time; the modification he proposed—Wednesday overnights with him—would have increased his parenting time to 50%.[2] He mainly seeks to have the children attend Our Lady of Refuge in Orchard Lake, for substantially the same reasons that he sought to have them attend a Royal Oak school in 2012.

Father still lives in Waterford, now with his third wife and 15-year-old stepdaughter, and Mother still lives in Farmington Hills where the children attend

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1 Father will say that he withdrew the First School Motion, but he did not. He withdrew his objections to the recommended order. That order therefore became the order of the court and the children remained at Kenbrook. MCL 552.507; MCR 3.215.

2 In the trial court, Father stressed that he was not seeking a custody change, merely a modification of parenting time. On appeal, he *does* allege—without development—that the parenting time change would "affect custody" for appellate jurisdictional purposes. *Madson* has settled this issue as to most parenting time orders.

school. Father concedes that the primary residence vests with Mother under the parties' consent judgment and that "primary residence" refers to school district and school choice (6/13/16 Tr at 5). Nevertheless, he argues that the boys should transfer out of the Farmington Hills school district and the school they have attended since kindergarten. Father claims that Our Lady of Refuge is a better school than Kenbrook, just as he claimed when he wanted a Royal Oak school, and that Our Lady of Refuge has fewer problems than Kenbrook (Second School Motion, ¶¶16, 22). He also makes parallel claims on the subject of convenience (*id.* at ¶19).

Father argued that the children's performance at Kenbrook had been adequate "but by no means exceptional" and made unsubstantiated claims of bullying (*id.* at ¶¶17-18). In fact, both children recently tested above the national average and one of them scored a full 10 points higher than the year before (Plaintiff's Response, ¶17). Mother denied the bullying allegation:

> There was an incident at school. The principal communicated to both of us about it, and there was no mention of bullying. The term 'bullying' comes from Mr. Marik. The term 'bullying' has never come from the school, and has never been proposed by the school that bullying has been going on. (6/13/16 Tr at 28).

D. The Referee Denies the Second School Motion

On May 2, 2016, the referee took testimony and considered the exhibits offered by the parties before denying both the request to modify parenting time for lack of material change in circumstances and the motion to change schools for lack of good cause shown "as the testimony indicates the children are progressing in a satisfactory manner at their current school and that their current school will not be closing in the foreseeable future." (Recommended Order dated May 2, 2016). Father objected.

E. The Trial Court Denies the Second School Motion

At the June 13, 2016 trial court hearing, Father's attorney confirmed that "[t]here has been no testimony or allegation asserted by my client [that the children] are doing poorly academically" (6/13 Tr at 8). His point was that Father *believes* the children *could* be doing better in a different school (*id.*). The court considered the children's report cards and the various emails the parties presented as well as Father's reports about the school district. Both parents were sworn in as witnesses (*id.* 12) and provided testimony.

> THE COURT: The change in circumstances, the reason why I asked you is he seems to pivot a lot on the fact that he is married, remarried and that changes the circumstances.
>
> Otherwise I don't see your argument in any fashion benefiting the children. The children are doing well in school. They are thriving. There seems to be no issue with the children.
>
> MR. CHRYSSIKOS [attorney for Father]: I'm not aware of any evidence that the children are thriving in school. They are doing passable. They are doing–
>
> THE COURT: If they weren't thriving I'm sure you would have pointed that out (*id.* 11).

During the hearing—which included testimony from both parents about a particular incident at the Kenbrook school, the children's scores on standardized tests, whether the school district was or was not encouraging one of the children to attend summer school when it "invited" (*id.* 29) him to do so, and how well the district was communicating with Father—neither Father nor his counsel requested any further evidentiary hearing. In his motion papers, Father made only a contingent "if necessary" request for an evidentiary hearing.

The trial court considered the parties' testimony and exhibits, as well as their counsel's arguments, before ruling. Most of Father's complaints about his children's school were generic complaints about the school district, not specific complaints about Kenbrook or experiences the parties' children were having. The court noted that anticipated problems should not be the basis for changing the children's school. "But you are anticipating problems with the school system. And I agree with [Mother's attorney], find a school system that doesn't have some issues" (*id.* at 33). The court also noted that since Father had withdrawn his objections to the first school order in 2012, "the children are established in this school" (*id.*).

F. Appellate Proceedings

The trial court's order was dated June 13, 2016. Rather than file an expedited application for leave then, which could have resulted in a decision before the school year started, Father filed a claim of appeal by right on July 5, as late as possible. The Court of Appeals dismissed that appeal administratively a week later, on July 12, for lack of jurisdiction. Still Father did not immediately file an application for leave in the Court of Appeals. Instead, he sought reconsideration from a panel of judges on the jurisdictional issue, which was denied on August 30. At about this time, the children began fourth grade at Kenbrook.

On October 10, 2016, 41 days after reconsideration was denied in the Court of Appeals, Father sought review of the jurisdictional decision from this Court (MSC No 154549). On December 10, Father filed a delayed application for leave in the Court of Appeals (COA No 336087), seeking to overturn the circuit court's decision on the merits. The delayed application has been fully briefed and is awaiting decision.

On February 3, 2017, the Court ordered oral argument on this application to address one question: Whether the Macomb Circuit Court's June 13, 2016 order denying the defendant father's motion to change the children's school enrollment and to modify parenting time was "a postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii)? This case will be argued together with the application pending in *Ozimek v Rodgers*.

ARGUMENT

The "affecting custody" exception to the final order rule for appellate jurisdiction is and should be a narrow one

A. The standard of review is de novo

Whether the Court of Appeals has jurisdiction over an attempted appeal of right is a pure question of law, reviewed *de novo* by this Court. The jurisdiction of the Court of Appeals is provided by law, and its practice and procedure are prescribed by court rules, statutes and the Constitution. Const 1963, art VI, §10; MCL 600.308; MCR 7.203 and 7.202(6). Unlike this Court or the circuit court, the jurisdiction of the Court of Appeals is "entirely statutory," *People v Milton*, 393 Mich 234, 245 (1974), and generally is limited to final judgments and orders. MCL 600.308. Interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo. *Marketos v American Employers Ins. Co.*, 465 Mich 407, 413 (2001).

The well-established rules governing the construction of statutes apply with equal force to the interpretation of court rules. *McAuley v General Motors Corp*, 457 Mich. 513, 518 (1998), *citing Smith v Henry Ford Hosp,* 219 Mich App 555, 558 (1996). When the plain language of a court rule is unambiguous, the expressed meaning is enforced without further judicial construction or interpretation. *CAM Const v Lake Edgewood*

Condominium Ass'n, 465 Mich 549, 554 (2002) *citing Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135 (1996). "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley, supra,* citing *Franges v General Motors Corp,* 404 Mich 590, 612 (1979).

B. History of the "affecting custody" exception

MCR 7.202(6)(a) defines a "final" order appealable of right as the first such order adjudicating all the claims of all the parties in a case. Certain other orders—orders that do not fit that definition—are also defined as "final" and thus appealable of right. There are four such categories, and the reasons underlying them are different. Circuit courts are permitted to "designate" interlocutory orders in receivership cases as final. As a matter of public policy, interlocutory orders denying governmental immunity are deemed final. The other two categories involve postjudgment orders. They cannot by definition be the "first" final order. One category is postjudgment decisions about attorney fee awards. The other category is the one at issue here:

> (6) "final judgment" or "final order" means:
>
> (a) In a civil case,
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor. MCR 7.202(6)(a)(iii)

The genesis of this court rule is the 1993 Report of the State Bar of Michigan Task Force on the Appellate Courts (Tab C), which recommended 21 categories of changes to this Court to address a huge backlog of more than 4,000 appeals in the Court of Appeals. Some of the proposals required legislation, others were rule-based. Almost all were designed to reduce the number of appeals of right coming before the Court of Appeals. Proposal 4 addressed postjudgment domestic relations orders:

4. Change Definition of Final Order in Post-Judgment Domestic Cases.

RECOMMENDATION: Only custody issues in post-judgment domestic relations cases should be appealable by right; all other orders entered post-judgment should be appealable only by leave.

Commentary: By amending the definition of "final judgment" in MCR 7.203, as set forth in the Appendix, the Court of Appeals docket will be reduced. Support issues may be easily ascertained by the Child Support Guidelines, resulting in a mechanical application which can be readily determined, and for which applications for leave would be more appropriate.

There is not a word in the recommendation or commentary about "legal custody" or the kinds of issues that come within the ambit of "legal custody." As the Court of Appeals noted in *Ozimek*, this Court's intent in 1994 was "to reduce the types of domestic relations cases from which a litigant could claim an appeal of right" (Tab A at 4). Those members of this Court who were Court of Appeals judges in the early 1990s will have no trouble remembering why. The Court of Appeals was being overwhelmed by its caseload, which was roughly twice the current load. Appeals took two years or longer to decide. It was during this period that the right of appeal from guilty pleas was eliminated, that circuit courts lost the ability to certify interlocutory orders as "final" for appeal (except in receivership cases), and that appeals of right from circuit court judgments on review of agency decisions were eliminated.

The Task Force recommendation for postjudgment custody orders appears in this Court's Administrative Order 94-55, entered December 30, 1994 (Tab D). The Court proposed to add this sentence at the end of MCR 7.203(A)(1):

> A final order does not include an order entered after judgment has been entered in a domestic relations action, except for an order affecting the custody of a minor... (Tab D, AO 94-55 at 5).

The Staff Comment to the February 2004 amendment shows that this change to MCR 7.203(A)(1) was made. The same rule's Staff Comment to the June 2002 amendment shows that this provision and others—which by then had undergone minor renumbering—were moved to MCR 7.202 in what was then subsection (7) and now is subsection (6). There is nothing to suggest that any change in meaning was intended or accomplished between 1994 and 2002 or, indeed, between 1994 and the present.

The Court of Appeals in *Ozimek* summarized these changes and stressed this Court's intent to limit orders appealable of right:

> As noted, before the 1994 amendment, MCR 7.203 did not restrict appeals by right in domestic relations matters. The amendment limited claims of appeal such that the only postjudgment orders in domestic relations cases appealable by right are those involving the custody of minors. When the Supreme Court amended the rule in 1994, it clearly intended to limit orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule. (Tab A at 3-4)

C. "Affecting custody" in MCR 7.202(6)(a)(iii) means altering custody rights

The phrase "affecting custody" denotes the idea of a change or alteration in the rights of the parties concerning their children. This includes both the right to have physical custody of a child and the right to make important decisions concerning the child. If those rights would continue as before, no matter how the circuit court ruled on the postjudgment motion before it, then the resulting order is not an order "affecting custody."

The analysis in *Ozimek* and *Madson* focuses exclusively on the word "custody" in MCR 7.202(6)(a)(iii), but the word "affecting" deserves attention as well. Only those

orders that resolve disputes which would affect custody rights are appealable of right. If the parties' custody rights would remain unaffected, however the circuit court resolved the particular issue before it, there is no appeal of right. Even if custody is given its bundled legal meaning of both physical and legal custody, there is no appeal of right unless granting the underlying relief sought would *alter* the parties' custody rights. MCR 7.202(6)(a)(iii) does not bestow final order treatment on every order that involves an exercise of a custody right or that relates to a custody right. The order must "affect" custody. The focus is not on the specific issue as to which the parties' need a decision from the circuit court, but on whether that decision changes the relative rights of the parties going forward.

For example, in the present case the parties had joint physical and legal custody of their children before Father filed his motion and they would still have had joint physical and legal custody of their children if the motion had been granted. The motion was not one "affecting custody" and so Father has no appeal of right.

This differs from the analysis in the *Ozimek* and *Madson* opinions—the Court will be reading *Ozimek* briefs together with this brief—and it answers the contention Father makes that "custody" is a legal term that encompasses both physical and legal custody. It explains why there is no appeal of right from parenting time orders that make merely minor changes in the time the child spends with each parent and why there may be an appeal of right from changes so substantial that the right of physical custody itself is implicated. And it explains why the inability of parents with joint legal custody to agree on a single decision like which school a child should attend does not result in an appeal of right.

This approach to "affecting custody" was set forth by Judge William Murphy in his dissenting opinion in *Varran v Granneman (On Remand)*, 312 Mich App 591, 626 (2015). *Varran* is a different sort of case, arising from a request for grandparenting time filed in what was originally a custody case filed by a now-deceased unwed mother. As in *Ozimek* and *Madson*, this Court directed the Court of Appeals to address a jurisdictional issue on remand. *Id.* 595-596.

Judge Murphy dissented from the majority's conclusion that a grandparenting time order could "affect custody," either physical or legal, because whichever way the grandparents' motion was decided, the father—the only living parent—would retain sole physical and legal custody of the child. After surveying the relevant statutes and the leading Michigan precedents from this Court and the Court of Appeals, *id.* 628-636,[3] Judge Murphy concluded that to "affect" custody, a postjudgment order must in some way *change* (or refuse to change) the prior custody arrangement. *Id.* 638-639. If no potential change is at stake, there can be no appeal of right. In *Varran*, no change was at stake because father would still have had sole physical and legal custody even if grandparenting time had been granted.

So too in the present case, Father and Mother will continue to share joint physical and legal custody of their boys, whichever school the children attend. Father is arguing that any issue that merely *implicates* or *involves* a legal custody issue—the exercise of a

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3 Judge Murphy considered, among others, *In re AJR*, 496 Mich 346 (2014) (discussing the two recognized forms of custody, physical and legal); *Wardell v Hinka*, 297 Mich App 127 (2012) (denying a motion to change custody "affects" custody); and this Court's order in *Thurston v Escamilla*, 469 Mich 1009 (2004), relied on in *Rains v Rains*, 301 Mich App 313 (2013) (order changing domicile to another state "is one *affecting* the custody of a minor"). *Varran*, 312 Mich App at 634.

decisional right—must be appealable of right, even if there is and can be no change in the parents' custodial rights. Accordingly, even if Father's thesis is accepted—that the word "custody" means both physical and legal custody in MCR 7.202(6)(a)(iii)—still there is no appeal of right if his motion did not seek to *change* either physical or legal custody, but merely asked the circuit court to substitute its judgment on a particular decision about the children because the parents could not agree.

Put another way, Judge Murphy focuses on the whole phrase "affecting custody," not the word "custody" in isolation. When prior Michigan law is analyzed in this way, it is apparent that the appeals of right come in cases where the effect on custody is to change it, not the cases which merely raise an issue that involves a specific exercise of legal custody rights.

This approach has much to recommend it. It will prevent the Court of Appeals from being clogged with appealed-of-right decisions better reviewed via applications, just as the *Ozimek/Madson* approach does. It will work with any definition of "custody." And it gives real meaning to the word "affecting," unlike the argument of those (like Father here) who try to use "affecting" as a vague synonym for "involving" or "related to."

"Affect" is a verb whose main meaning is "to influence, to have an effect on." B. Garner, *Garner's Modern English Usage* 27 (4th ed 2016). The natural reading of "affecting...custody" is that *custody*—the legal right itself—is what is affected; there is some change to (i.e., an effect on) the custody right. But when parents bring their dispute over which school their children should attend to a judge for resolution, they typically are not asking the judge to alter or change their custody rights—it's possible, but that didn't happen here—they are merely asking the judge to make a particular

decision because they've been unable to do so themselves. What is affected is not custody, but where the children attend school. Father and Mother continue to share joint legal custody. The judge has simply directed the exercise of that shared custody right in one instance, without "affecting" the right itself.

In the overwhelming majority of cases, Judge Murphy's approach and the *Ozimek/Madson* approach will yield the same result on jurisdiction. A very recent case illustrates this. In *Lieberman v Orr*, ____ Mich App ____ (March 7, 2017) (Tab E), mother had physical custody, father had generous parenting time (140 overnights a year) and the parties had joint legal custody. The children had established custodial environments with both parents, who lived more than 150 miles apart. Father sought to change the children's school for academic reasons, and requested that the parenting time arrangement be "flipped" to accommodate the school change. This amounted to an 85-day reduction in mother's time with the children, nearly a 40 percent reduction.

The panel majority applied the *Ozimek* precedent and found it had jurisdiction because the effect of the trial court's order clearly affected physical custody (Tab E at 1 n.1). The dissenting opinion, misunderstanding the scope of *Madson*, disagreed (*id.*, dissenting slip op at 4). This appears to be an outlier view, as other cases to consider a change of parenting time on the order of 85 days have either accepted appeals of right or deemed them to be applications for leave and granted them. The result would be the same using Judge Murphy's approach of considering whether custody would be "altered" by the requested change. It would, of course, for the same reason given by the *Lieberman* majority—a 40% reduction in the time during which mother had the primary care for and authority over her children *does* affect her custody rights, whether labeled as a change in parenting time or custody.

As for legal custody, that issue was irrelevant in *Lieberman* because *Ozimek* puts the focus on physical custody. It is also irrelevant in Judge Murphy's analysis because the parents still had joint legal custody after the trial court's decision, just as they did before. No change in legal custody rights was requested. The parties simply needed help with a particular application of those rights to a school-choice question because they were at an impasse. When the next important decision needs to be made regarding the children, their rights will be unchanged.

D. "Custody" in MCR 7.202(6)(a)(iii) means physical custody

The term "custody," used by itself in the domestic relations context, almost always refers specifically to the physical custody of children. A child may live with one parent who has "sole custody" or with both parents if they have "joint custody." The legal right to make important decisions affecting the child's life—where they attend school, their religious upbringing, the medical care they receive and so on—is called "legal custody" and almost always is referred to using that phrase and not the single word "custody." This too is a right that may or may not be shared by the parents.

It is relevant that the Court of Appeals rules use the unadorned word "custody" in another location too, namely MCR 7.213(C)(2). This rule lists the categories of cases given precedence on the Court's calendar. There is no basis for thinking that the word "custody" means anything different in MCR 7.213(C)(2) than it does in MCR 7.202(6)(a)(iii). If every postjudgment order in a domestic relations case that relates to either physical or legal custody, either by a grant or denial of the relief requested, is an order appealable of right, then it is also an appeal that must be given precedence on the Court of Appeals' calendar. This means, necessarily, that other important appeals will

have to wait longer for submission to a panel, simply because they have no rule-based claim to priority treatment.

If this Court were crafting an appellate rule today for postjudgment orders in domestic relations cases, it might well consider limiting appeals of right to orders affecting physical custody. The Court of Appeals listed several cogent reasons in *Ozimek* why that is a better place to draw the jurisprudential line, to further the rule's purpose of limiting postjudgment appeals of right in domestic relations case to those in which the most important issues are at stake. This is not to suggest that there are not important issues related to legal custody. There are. But questions like which school a child attends are best addressed in the trial court. If a court decides that a child should attend a new school, and the experiment proves disastrous, the better fix is in the trial court, not the Court of Appeals. The Court of Appeals is not equipped to consider new evidence, not in the record, that demonstrates why the school change order is contrary to the best interests of the child.

The Court should give the word "custody" a plain language reading. This term, used by itself, is understood to mean physical custody. In contrast, when "legal custody" is meant in the domestic relations context, that phrase and not the single word is used. Lawyers and lay people alike, when shown the language of MCR 7.202(6)(a)(iii) and asked which postjudgment orders are appealable of right, expect that the order must affect the physical custody of a child—where the child primarily lives. This reading is more apt for an exception to the general rule that was being established at the same time, namely that only the "first" final order is appealable of right.

Proponents of a policy permitting appeals of right from any postjudgment order granting or denying relief that involves either physical custody or shared decision

making (legal custody) make two principal arguments why that would be better. First, they contend that certain post-judgment orders (domicile, parenting time) resolve disputes not explicitly cast as change-of-custody motions, yet still inevitably affect custody. Second, they reject the contention that the rule they prefer would result in a flood of new appeals of right.

As to the first contention, it is true that some requests for domicile changes and parenting time changes are so substantial that, if granted, they would certainly affect custody. The key point, however, is that the orders resulting from those requests are appealable of right because of effects on *physical* custody. If parents have equal or near equal parenting time and one of them is permitted to relocate with the child to another state, the remaining parent's physical custody rights are undoubtedly affected. If parties co-parent their children in roughly equal proportions, and one requests a change in parenting time that would relegate the other parent's time with the children to the occasional weekend and a summer vacation, physical custody rights are affected.

That, however, is no argument for extending appeals of right to every legal custody decision made when parents are unable to resolve an issue over which they each have rights, such as where the children will attend school if the proposed school change does not require a modification of parenting time[4], what church they will attend, what doctors they will see, what vaccinations they will receive, whether grandparents will have visitation rights, how much child support should be paid, and so on.[5] Father's "best

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4 While Father did request that parenting time be changed in his Second School Motion, the school change could have been granted without modifying parenting time, unlike *Lieberman*.

5 As the Court of Appeals noted in *Ozimek*, "[l]egal custody could be implicated in countless decisions regarding a child, such as which vaccinations a child should

approach" proposal is that any postjudgment order affecting a "modifiable" aspect of physical or legal custody should be appealable of right (Application at 19). But this is too broad.

Already, with physical custody alone, there will be cases where the jurisdictional line between appealable of right and appealable by leave is not certain. Minor or temporary parenting time changes do not affect custody; major changes may. In between the polar opposites there will be cases where judges may reasonably disagree whether physical custody would be affected by the requested change. Father's proposal would not merely increase substantially the number of cases in which debatable jurisdictional decisions would have to be made; it also would multiply the *kinds* of facts that would need to be assessed in determining jurisdiction.

In a school choice case like the present one (setting aside the minor parenting-time change Father also requested, which was not essential to implement the school change), unless *every* request to change schools is to be appealable of right automatically, the Court of Appeals will have to assess the facts surrounding the request first to determine the Court's jurisdiction. The key, Father suggests, is whether the

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receive, which parent should pay for a psychologist fee, which daycare center a child should attend, which party should pay for the child's transportation to parenting time, or whether the child should be enrolled in football." (Tab A at 7.)

The Court noted additional examples in *Madson*: "An expansive definition could include all manner of decisions regarding the child, allowing appeals by right to be taken from decisions, for example, whether to allow a child to attend one specific summer camp over another; whether to allow a child to participate in travel soccer; whether one parent or the other would pick up the child from school; or from decisions regarding 'how to treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child,'" (Tab B at 7, quoting *Varran v Granneman (On Remand)*, 312 Mich App 591, 607 (2015) (addressing the issue in the context of a motion for grandparenting time).)

requested change involves new facts not previously subject to appellate review (Application at 18). The lurking problem, however, is that the Court will be forced to wade into the dispute before it knows whether it has jurisdiction.

In his reply brief, Father suggested that only "important decisions affecting the welfare of the child" under MCL 722.26a(7)(b) should be appealable of right (Reply Brief at v). These are said to be limited by case law to "health care, religious upbringing, and education" (*id.*).[6] It appears, then, that Father believes the rule should be that every request to change a child's school, church or doctor gives rise to an order appealable of right, subject only to the remedy for vexatious appeals in MCR 7.216(C) (Reply Brief at 8). That would put school choice motions on an entirely different footing from parenting time motions, where even Father acknowledges that some threshold must be attained before there is an appeal of right.

Jurisdiction is not supposed to be a fact-intensive question. It is supposed to be a threshold question of law, black-and-white, yes or no. That is not always possible, however. Federal diversity jurisdiction, for example, can require consideration of facts. In MCR 7.202(6)(a)(iii) itself, as soon as a Michigan court first held that a parenting time order could affect custody depending on how substantially it affected the balance of time a child spends with each parent, the question was no longer purely a legal question.

In the present case, the issue was where the parties' two nine-year-old children should attend the fourth grade—the school they had been attending since kindergarten, or a new school entirely. Other scenarios, of course, are likely to arise. Parents may

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6 But Father does not actually mean that jurisdiction can be determined as simply as that. As he asserts himself, "[d]etermining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor....[T]he question...can be complicated." (Application at 3.)

disagree about curriculum for their children in high school. How many advanced placement classes are too many? Should a child be permitted to play varsity football with the attendant risk of serious injury? Should a child be permitted to participate in a school-sponsored trip to a foreign country? Father oversimplifies in suggesting that all school choice decisions ought to be appealable of right just because there may be new facts, not previously reviewed on appeal.

E. Appellate review of decisions related to legal custody should be by application

The Court of Appeals, unlike a federal court, *always* has jurisdiction to review a circuit court decision if the issue is timely raised, because of its discretionary review powers. In that sense, the appeal-of-right vs application-for-leave question determines only which internal track the appeal will take through the Court, not whether the Court of Appeals has the legal power to review the lower court decision. Proponents of broader custody jurisdiction, including Father and the amici curiae, argue as though it is an appeal of right or nothing, which plainly is not true.

Most joint legal decisions are so time-sensitive that even the priority given to custody cases on appeal often is not fast enough to timely address the issue. Issues like a requested change of schools or a choice between medical treatments, even if they were appeals of right, would still need to be coupled with a motion for immediate or extra-expedited treatment and a request for peremptory relief, making them functionally the equivalent of applications for leave coupled with a motion for immediate consideration. Not only is the availability of an application for leave appellate recourse, it is the kind of recourse that, in substance, parties are going to be seeking most of the time, whichever kind of appeal they file, confirming that the *Ozimek* rule is both workable and desirable.

Postjudgment applications for leave to appeal differ from interlocutory applications in that they are not denied as premature. That is, the Court of Appeals has no need to consider whether the appellant will "suffer substantial harm by awaiting final judgment" (MCR 7.205(B)(1)) if leave is denied. The Court of Appeals knows that its decision on a postjudgment order is, unless this Court intervenes, the only appellate review the order will ever receive. Accordingly, there is very little difference in substance between a decision on a peremptory motion for reversal filed in an appeal of right and an application for leave to appeal that seeks a peremptory order.

This is especially true if the appeal of right includes a motion for peremptory reversal. Then the process is indistinguishable from the process authorized in MCR 7.205(E)(2) (Court of Appeals may enter a final order on the application papers). In neither situation will there be oral argument or time to transmit a record from the trial court. Reading MCR 7.202(6)(a)(iii) to permit many, many more appeals of right than are now allowed would simply steer litigants to the less apt avenue of appellate recourse.

RELIEF REQUESTED

Father's application says, "Determining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor....[T]he question...can be complicated" (Application at 3). That is only true if this Court adopts Father's recommended approach. Determining jurisdiction already is a "straightforward endeavor" under both the reading advocated for in this brief and the guidance provided by the Court of Appeals in *Ozimek* and *Madson*.

If the order appealed resolves a motion that, if granted, would result in an order "affecting custody," the Court need only determine (in a matter involving a legal custody decision) whether parents with joint legal custody continue to have the same rights after the decision appealed. If the issue is physical custody, the Court will use the same analysis it has used for a number of years to determine whether the change of domicile or reallocation of parenting time is serious enough to impact physical custody rights.

Under the *Ozimek/Madson* analysis, the Court will not permit appeals of right from orders involving only an exercise of legal custody and will use the same analysis it always has if the issue relates to physical custody. Either way, Father's appeal of right in this case was properly dismissed for lack of appellate jurisdiction.

Respectfully submitted,

JAFFE, RAITT, HEUER & WEISS, P.C.

By: /s/Susan S. Lichterman (P42742)
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Dated: March 17, 2017

TAB A

STATE OF MICHIGAN

COURT OF APPEALS

VANESSA OZIMEK,

Plaintiff-Appellant,

v

LEE J. RODGERS,

Defendant-Appellee.

FOR PUBLICATION
August 25, 2016
9:15 a.m.

No. 331726
Wayne Circuit Court
LC No. 13-109046-DC

ON REMAND

Before: SAWYER, P.J., and HOEKSTRA and O'BRIEN, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for further consideration of our March 8, 2016 order dismissing plaintiff's claim of appeal for lack of jurisdiction. The Supreme Court has directed us to "issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Ozimek v Rodgers*, ___ Mich ___ (2016) (Docket No. 153836). We conclude that this Court does not have jurisdiction over the circuit court's order denying plaintiff's motion to change the child's school, and accordingly, dismiss plaintiff's appeal.

I. BASIC FACTS

Plaintiff Vanessa Ozimek and defendant Lee Rodgers, who were never married, are the parents of a son, who currently is nine years old. The parties share joint legal and physical custody of the child pursuant to an order of July 30, 2014. Plaintiff has primary physical custody, and defendant has parenting time every Thursday after school and every other weekend. Defendant resides with his partner in Riverview, Michigan, and plaintiff initially resided in Taylor, Michigan. The child was enrolled in Arno Elementary, an Allen Park school of choice,

since he became school-aged.[1] In May 2015, plaintiff and the child moved to Livonia with plaintiff's fiancé. In July 2015, plaintiff filed a motion to switch the child's school from Arno Elementary in Allen Park to Grant Elementary in Livonia.

The parties could not agree that the child should switch schools, so the court decided the dispute after attempted mediation and several evidentiary hearings. In the interim, defendant filed a motion to modify parenting time and that motion was denied. In its decision regarding the change in schools, the trial court found that an established custodial environment existed with both parents. The court opined that the change in schools would alter the established custodial environment because it would be extremely difficult for defendant to maintain his parenting time schedule. The court reasoned that it had no reason to upset the current situation, where each party provided the minor child with a stable and satisfactory home environment. The court noted several factors in its decision, including that the child had attended Arno Elementary for his entire scholastic career, that the child had many friends at that school, and that the child's relationship with his step-siblings at his father's house would suffer if he changed schools. The court further observed that if the child were to attend Livonia schools, he would attend Grant Elementary for just one year, then another school for two years, only to move to a third school.

Plaintiff filed a claim of appeal and contended that, where child custody is comprised of legal and physical components, the order denying her motion to change the child's school district was appealable as a matter of right as an order affecting the custody of a minor. This Court dismissed the appeal on the basis that the order denying a change in the child's school was not a final order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii).[2]

Plaintiff moved for reconsideration, arguing in part that the denial of her motion affected the child's legal custody—a parent's decision-making authority regarding the important decisions concerning a child. This Court denied the motion for reconsideration.[3]

Plaintiff appealed to our Supreme Court. The Michigan Coalition of Family Law Appellate Attorneys and the Legal Services Association of Michigan filed an amici curiae brief asking for a ruling that postjudgment orders deciding education issues between joint legal custodians are appealable by right under MCR 7.202(6)(a)(iii). The Supreme Court issued an order vacating this Court's order of dismissal and remanding for further consideration. The order provides, in pertinent part:

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[1] The parties chose Arno because they were living in nearby districts with what they believed were inferior school systems, so the child always has attended school in a district where neither parent lives.

[2] *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered March 8, 2016 (Docket No. 331726).

[3] *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered April 22, 2016 (Docket No. 331726).

> On remand, we DIRECT the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012).
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> We do not retain jurisdiction. [*Ozimek v Rodgers*, ___ Mich ___ (2016) (Docket No. 153836).]

II. STANDARD OF REVIEW

Whether this Court has jurisdiction over an appeal is an issue of law subject to de novo review. *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). Likewise, the interpretation of a court rule is a question of law that receives de novo review. *Estes v Titus*, 481 Mich 573, 578–579; 751 NW2d 493 (2008).

III. JURISDICTION UNDER MCR 7.202(6)(a)(iii) AND MCR 7.203(A)

Jurisdiction here invokes two court rules, MCR 7.202 and MCR 7.203. This Court relies on the following principles when interpreting a court rule:

> The rules of statutory interpretation apply to the interpretation of court rules. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. [*Varran v Granneman (On Remand)*, 312 Mich App 591, 599; 880 NW2d 242 (2015) (citations omitted).]

Addressing first MCR 7.203(A)(2), the rule indicates that this Court has jurisdiction of an appeal from an order of a court or tribunal from which an appeal by right to this Court has been established by law or court rule. No law or court rule establishes an appeal by right to this Court from an order denying a change in a child's school, so MCR 7.203(A)(2) does not apply.

The question then becomes whether jurisdiction exists under MCR 7.203(A)(1), which provides an appeal by right from an order that meets the definition of a "final order" under MCR 7.202(6). Subpart (a) of that court rule includes the following definitions of a final order in a civil case:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order
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> * * *
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor . . . . [MCR 7.202(6)(a)(i) and (iii).]

MCR 7.202(6)(a)(i) does not apply here. The current order being appealed does not dispose of all the claims and rights of the parties, but merely denies plaintiff's motion to change the minor child's school.[4] It is not a final order under MCR 7.202(6)(a)(i).

We next consider whether the order denying the motion to change the child's school is an order "affecting the custody of a minor" within the meaning of MCR 7.202(6)(a)(iii). We begin by examining the origin of the language in the court rule. Before 1994, MCR 7.203, the court rule governing this Court's jurisdiction over appeals by right, did not limit appeals by right in domestic relations matters. It provided that this Court had jurisdiction over a final order of the circuit court without limiting orders in domestic relations cases.[5] In 1994, our Supreme Court amended MCR 7.203 to provide that a final order did not "include an order entered after judgment has been entered in a domestic relations action, except for an order affecting the custody of a minor."[6] The staff comment to the February 1994 Amendment indicates that the court rule change "eliminates appeals of right as to certain types of judgments or orders. . . . In domestic relations cases, the only postjudgment orders that will be appealable by right are those involving the custody of minors." See comment, MCR 7.203(A)(1). In light of the restricting language, it is apparent that our Supreme Court intended to reduce the types of domestic relations cases from which a litigant could claim an appeal by right.

To support her argument that the court rule should be interpreted to include the denial of a motion to change a child's school, plaintiff relies on *Lombardo v Lombardo*, 202 Mich App 151, 152; 507 NW2d 788 (1993), in which the appellant mother challenged the trial court's decision not to enroll the child in a program for gifted students. *Lombardo*, however, is not helpful here where the claim of appeal in *Lombardo* was filed in 1991, before the current version

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[4] The first final order was the July 2014 order awarding the parties joint legal and physical custody of the child.

[5] In 1993, MCR 7.203(A) provided that appeals by right could be filed from "(1) a final judgment or final order of the circuit court, court of claims, and recorder's court, except a judgment or order of the circuit court or recorder's court on appeal from any other court; or (2) a final judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law."

[6] In 2002, the provision was removed from MCR 7.203 and added to MCR 7.202(6)(a)(iii) (see staff comment to MCR 7.203).

of the court rule limiting appeals of right to those postjudgment orders affecting custody, and the *Lombardo* decision contains no discussion of the language at issue in this case.

Plaintiff also cites *London v London*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2015 (Docket No. 325710), to bolster her position that the order in this case is a final order. The Court in *London* noted a long history of treating orders regarding school and custody as appealable by right, citing several cases. For example, in *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009), the appellant mother challenged the trial court's order changing the child's school from home-schooling with her to public school because it would directly impact the amount of time she spent with the child. In contrast, the court's order here did not change the child's school, nor did it directly impact the amount of either parent's parenting time. Where the order does not change the amount of time spent between the child and either parent, it simply cannot be said to have affected custody. Also, *London* cited *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010), in which the appellant mother appealed the trial court's order refusing to change the children's school district to a new district 60 miles away because it would have changed the appellee's parenting time.[7] In contrast, the trial court's decision here did not impact the amount of parenting time or the number of overnights with either parent.

In *London*, the trial court denied the defendant's motion to modify parenting time, a decision that implicated the number of overnights and thus directly affected where and with which parent the children would stay. The *London* court further observed—unnecessarily, in that it had already determined that the order affected custody—that a *change* in school districts would seem to affect custody. *Id.*, slip op at 1-2 (emphasis added). The Court stated that "[s]uch a change obviously impacts where the children will attend school. It also affects whether they will attend latchkey, how far they will travel to school, whether they will attend the same school as their stepsiblings, and whether they will attend a school in the community in which they reside most school nights." *Id.*, slip op at 2. In this case, the trial court denied the motion to change school districts. The court's decision did not change the number of overnights, nor did it change the child's school. Although that decision obviously impacts where the child will attend school, it is not an order "affecting custody" of the child.

Plaintiff also cites *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013),[8] which noted that the Child Custody Act distinguishes between physical custody (the location where the child resides) and legal custody (the decision-making authority regarding important decisions relating to the child's welfare). Compare MCL 722.26a(7)(a) with MCL 722.26a(7)(b). That the concept of custody can involve physical and legal elements does not

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[7] *Pierron* initially was dismissed for lack of jurisdiction on the ground that the order did not affect the custody of the minors, but this Court reinstated the claim of appeal upon reconsideration.

[8] *Grange* was not a domestic relations case. The question before this Court in *Grange* was whether a child of divorced parents can be "domiciled" in more than one location for purposes of receiving benefits under the no-fault act.

mean, however, that this Court should assume that the term custody in MCR 7.202(6)(a)(iii) invokes both facets.

Whether a trial court's ruling regarding school choice is reviewable by this Court is not in dispute. Rather, the question here is a procedural one: whether the dispute over school choice is reviewable as a matter of right, or whether it is required to be brought by application. Parents have the right to control the education of their children, see *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004), so it follows that the choice of a child's school is an important decision affecting the welfare of a child. But in the absence of express language describing "custody," this Court must determine whether that term incorporates legal custody as well as physical custody.

In interpreting the rule, this Court must give effect to the Supreme Court's intent within MCR 7.202(6)(a)(iii). See *Varran*, 312 Mich App at 599. As noted, before the 1994 amendment, MCR 7.203 did not restrict appeals by right in domestic relations matters. The amendment limited claims of appeal such that the only postjudgment orders in domestic relations cases appealable by right are those involving the custody of minors. When the Supreme Court amended the rule in 1994, it clearly intended to limit orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule.

This Court has not traditionally included legal custody considerations in the interpretation of MCR 7.202(6)(a)(iii) and has dismissed for lack of jurisdiction cases challenging school choice decisions that do not alter parenting time and thus do not influence where the child will live.[9] This Court, however, has not always been consistent in its dismissal of cases involving a choice of schools. For instance, *Mellema v Mellema*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2016 (Docket No. 329206), involved a motion to change the children's school district in the broader context of the plaintiff's move from Fremont to Grandville (roughly 40 miles apart). In its decision, the *Mellema* Court concluded that, in general, a party may appeal by right an order regarding the denial of a motion to change school districts, citing *Varran's* reference to legal custody. *Id.*, slip op at 5-7. Given the lack of clarity regarding whether legal custody should be included in the definition of custody in MCR 7.202(6)(a)(iii), we urge our Supreme Court to weigh in on the issue. Further, should practitioners wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request.

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[9] Two examples of such cases include those cited by appellant, *Goriee v Daud-Goriee*, unpublished order of the Court of Appeals, entered March 4, 2015 (Docket No. 326227), and *Tison v Tison,* unpublished order of the Court of Appeals, entered March 4, 2015 (Docket No. 326158).

Until such time as the court rule is clarified, however, we opine that the addition of legal custody in the custody definition in MCR 7.202(6)(a)(iii), as championed by plaintiff, would so broaden the court rule that few, if any, postjudgment orders in domestic relations cases would be exempt. With regard to a change in schools, this issue could arise every new school year.[10] As well, an argument could be made that child support orders affect the decision-making authority regarding important decisions relating to the child's welfare, so those orders also would be appealable by right. Legal custody could be implicated in countless decisions regarding a child, such as which vaccinations a child should receive, which parent should pay for a psychologist fee, which daycare center a child should attend, which party should pay for the child's transportation to parenting time, or whether the child should be enrolled in football. If legal custody is included in the definition in MCR 7.202(6)(a)(iii), parents conceivably could challenge orders that change the home environment in any way. Using legal custody as a basis for this Court's jurisdiction would permit a far-reaching array of cases to be appealed by right to this Court. This Court has made considerable progress since the 1994 court rule amendment to eliminate the crushing backlog of appeals and to decrease the time in which appeals are resolved. If all orders involving legal custody issues are to be appealable by right and receive the same priority status as actual custody disputes, this Court's forward progress in expediently resolving appeals will be swiftly thwarted.

IV. CONCLUSION

This Court does not have jurisdiction over this case, given that an order denying a motion to change schools is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii). Further, we decline to exercise our discretion to treat the claim of appeal as an application for leave to appeal and grant the application, *Pierce v City of Lansing,* 265 Mich App 174, 183; 694 NW2d 65 (2005), and instead dismiss the claim for lack of jurisdiction.

Dismissed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Colleen A. O'Brien

[10] In this case, provided the child continues to attend Arno Elementary, the issue will arise again at the conclusion of the 2017-2018 school year, when the child will complete his fifth grade year and graduate from Arno Elementary.

TAB B

STATE OF MICHIGAN

COURT OF APPEALS

RONNIE MADSON, JR.,

Plaintiff-Appellant,

v

LATOYA JASO,

Defendant-Appellee.

FOR PUBLICATION
August 25, 2016
9:10 a.m.

No. 331605
Lenawee Circuit Court
LC No. 11-037046-DC

ON REMAND

Before: SAWYER, P.J., and HOEKSTRA and O'BRIEN, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for further consideration of our March 7, 2016 order dismissing plaintiff's claim of appeal for lack of jurisdiction. The Supreme Court has directed us to "issue an opinion specifically addressing the issue whether the order in question may affect [the] custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Madson v Jaso*, ___ Mich ___ (2016) (Docket No. 153729). We conclude that this Court lacks jurisdiction over this provisional postjudgment order for makeup parenting time, and accordingly, dismiss plaintiff's appeal.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff Ronnie Madson, Jr., and defendant Latoya Jaso, who were never married, are the parents of a minor child born in 2009. In December 2011, the circuit court entered an order providing that the parties would share joint legal custody and plaintiff would have physical custody of the child. Parenting time would be at times agreeable to the parties. In June 2014, in response to defendant's request for a more formal parenting time arrangement, the circuit court set forth a parenting time schedule where defendant was to have one mid-week overnight and alternating weekends with the child.

The parents then made separate reports to Child Protective Services regarding abuse of the child, but the allegations were not substantiated. In October 2014, plaintiff moved to amend the parenting time order, but the motion was not heard because defendant was jailed in November 2014 for nonpayment of child support.

In December 2014, the circuit court entered an ex parte order granting plaintiff extended parenting time. Upon defendant's release from jail, she petitioned for reinstatement of her parenting time. The circuit court referred the matter to the Friend of the Court in February 2015, and the referee held an evidentiary hearing in May 2015.

Six months later, in October 2015, the Friend of the Court referee recommended that defendant's parenting time should be restored and nothing should prevent her from having normal, regular parenting time with the child. Plaintiff did not comply with the order and objected to it.

At a December 2015 hearing, the circuit court ruled that defendant was owed makeup parenting time. The court ordered that defendant would have five days of uninterrupted parenting time and that the parties would alternate future weeks. The court also set up a Christmas holiday schedule. Plaintiff did not comply with the order. The following day, the circuit court issued an order directing plaintiff to immediately turn over the child to defendant for makeup parenting time. Plaintiff again did not comply with the order. Instead, plaintiff obtained a personal protection order from the county where he lived.

At a January 2016 hearing, the circuit court observed that it would resolve the matter in the child's best interests, warning plaintiff that it would issue an arrest warrant for him for contempt if he did not abide by the order, and directed the parties to obtain a custody evaluation from a psychologist in anticipation of a custody trial. In the interim, plaintiff was to have parenting time on alternating weekends.

Plaintiff filed a claim of appeal in this Court, maintaining that the instant makeup parenting time order represented an order that affected custody. This Court dismissed the appeal on its own motion for lack of jurisdiction.[1] Plaintiff moved for reconsideration, which this Court denied.[2]

Plaintiff applied for leave to appeal from our Supreme Court, arguing that this Court's decisions with respect to jurisdiction were inconsistent and requesting that the case be remanded to this Court as on leave granted. He stated that he was not asking the Supreme Court to grant leave to appeal given the potential for delay, and indicated that the trial court and this Court had already caused delays in this matter.[3] Amicus Curiae Michigan Coalition of Family Law

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[1] *Madson v Jaso*, unpublished order of the Court of Appeals, entered March 7, 2016 (Docket No. 331605).

[2] *Madson v Jaso*, unpublished order of the Court of Appeals, entered April 18, 2016 (Docket No. 331605).

[3] We note that this Court dismissed plaintiff's claim of appeal just 18 days after it was filed. Despite this Court's standard observation in a dismissal order that appellant could file an application for leave to appeal in this Court, plaintiff instead moved for reconsideration. After reconsideration was denied, plaintiff still did not file an application seeking review on the merits from this Court, but instead chose to file an application in our Supreme Court.

Appellate Attorneys[4] filed an amicus brief in the Supreme Court and called for clarity regarding jurisdiction in domestic relations appeals.

On June 24, 2016, our Supreme Court issued an order vacating this Court's March 7, 2016 order of dismissal and remanding for further consideration. The order provides, in pertinent part:

> On remand, we DIRECT the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect [the] custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand),* 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012).
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> We do not retain jurisdiction. [*Madson v Jaso*, ___ Mich ___ (2016) (Docket No. 153729).]

II. STANDARD OF REVIEW

Whether this Court has jurisdiction over an appeal is an issue of law subject to de novo review. *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). Likewise, the interpretation of a court rule is a question of law that receives de novo review. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. ANALYSIS

The question of jurisdiction in this case rests on two court rules, MCR 7.202 and MCR 7.203. When interpreting a court rule, this Court relies on the following principles:

> The rules of statutory interpretation apply to the interpretation of court rules. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. [*Varran v Granneman (On Remand)*, 312 Mich App 591, 599; 880 NW2d 242 (2015) (citations omitted).]

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[4] The Coalition is an informal group of appellate attorneys whose practices primarily involve domestic relations appeals.

MCR 7.203(A) contains two subparts, and the latter is quickly addressed. MCR 7.203(A)(2) indicates that this Court has jurisdiction of an appeal from an order of a court or tribunal from which an appeal by right to this Court has been established by law or court rule. No law or court rule establishes an appeal by right to this Court from an order setting forth makeup parenting time, so MCR 7.203(A)(2) does not apply.

Accordingly, we turn to MCR 7.203(A)(1), which provides an appeal by right from an order that meets the definition of a "final order" under MCR 7.202(6). Subpart (a) of that court rule includes the following definitions of a final order in a civil case:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order
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>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor . . . . [MCR 7.202(6)(a)(i) and (iii).]

MCR 7.202(6)(a)(i) does not apply here. The current order being appealed does not dispose of all the claims and rights of the parties. The order was one of a series of provisional, postjudgment parenting time orders issued before the parties undergo a custody evaluation in preparation for a custody trial, so it is not a final order under MCR 7.202(6)(a)(i).[5]

The dispositive issue, therefore, is whether the instant parenting time order is an order "affecting the custody of a minor" within the meaning of MCR 7.202(6)(a)(iii). In examining this issue, we consider the nature and scope of the order being appealed, and decide what the order is, at its essence, and what it is not. The order does not change the parties' custody over the minor child, because the court's order regarding custody still stands; plaintiff retains sole custody. The order grants makeup parenting time to defendant as a result of plaintiff's withholding of parenting time for months. That the order does not have a specific end date does not mean that it is not clearly an interim order. Also, because the order resulted from plaintiff's withholding of makeup parenting time to defendant, the circuit court did not examine the best-interest factors under MCR 722.23 in the context of a custody decision.[6] Indeed, the circuit court properly considered the makeup parenting time separate and apart from custody.

Michigan appellate courts have wrestled with the application of MCR 7.202(6)(a)(iii). Our Courts generally have held that an order need not expressly indicate that it is a custody determination to affect custody. See *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004). This Court has ruled that the court rule does not require that the order be permanent to

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[5] The first final order in this case was the December 2011 order awarding the parties joint legal custody of the child, and awarding physical custody to plaintiff.

[6] Nor did it examine the factors designed for parenting time determinations in MCL 722.27a(6).

fall within MCR 7.202(6)(a)(iii). *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007).

Determining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor. This Court's jurisdiction by right over orders affecting child custody has been recognized in cases involving the denial of a motion to change domicile, *Thurston*, 469 Mich 1009; the denial of a motion to change the children's school, *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009); and the grant of a motion for grandparenting time, *Varran*, 312 Mich App 591. Conversely, this Court has dismissed claims of appeal for lack of jurisdiction on the basis that the orders appealed do not affect the custody of a minor in cases involving the declaration that the children shall continue to attend the same elementary school until further order of the circuit court, *Zalewski v Garrison,* unpublished order of the Court of Appeals, entered November 6, 2014 (Docket No. 323543); a ruling to hold in abeyance for six months a decision regarding custody and parenting time based on the parents' progress, *Hutchison v Leadbetter*, unpublished order of the Court of Appeals, entered May 3, 2016 (Docket No. 332503), lv pending; and the denial of a parent's request to change a child's school enrollment from one school to another, *Marik v Marik*, unpublished order of the Court of Appeals, entered July 12, 2016 (Docket No. 333687). These cases illustrate that the question of jurisdiction under MCR 7.202(6)(a)(iii) is not without complication. The difficulty is exacerbated by ambiguity in the language of the court rule. We therefore urge the Supreme Court either to amend the court rule to resolve the confusion, or to clarify its intent in an opinion.

In attempting to discern our Supreme Court's intent in the court rule, this Court previously has examined the plain language of MCR 7.202(6)(a)(iii). The court rule does not define "affecting," so this Court in *Wardell*, 297 Mich App at 132, relied on the dictionary definition of the term "affect" as "[m]ost generally, to produce an effect on; to influence in some way." *Black's Law Dictionary* (9th ed). The *Wardell* Court noted that an order affecting custody includes one where the trial court's ruling has an effect on where the child will live. *Id.* The Court's focus there was on the physical location of the child, and the Court determined that orders denying a motion to change custody are included within the definition of MCR 7.202(6)(a)(iii), reasoning as follows:

> In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [*Id.* at 132-133.]

The order in this case did not resolve which parent would have custody of the child, nor did it resolve where the child will live. Rather, it set forth makeup parenting time because plaintiff had unilaterally withheld the same from defendant.

This Court cited *Wardell* in *Rains v Rains*, 301 Mich App 313, 321-322; 836 NW2d 709 (2013), in which the plaintiff appealed the denial of her motion to change domicile from Detroit to Traverse City and the resulting modification of her parenting time. In response to the motion, the defendant had moved for a change in custody. *Id.* at 314-315. The *Rains* Court decided that the relevant inquiry was whether a trial court's order "influences where the child will live, regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.' " *Id.* at 321, citing *Wardell,* 297 Mich App at 132-133. This Court determined that the trial court's denial of the plaintiff's motion to relocate necessarily influenced where the child would live and that decision implicitly denied the defendant's motion to change custody. *Id.* at 323. This Court added that "[i]f a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment." *Id.* at 324.

In this case, plaintiff retained physical custody of the child, although the court did order extensive makeup parenting time to defendant. That the order in the interim substantially reduced the amount of time plaintiff could spend with the child is not dispositive, where it did so in the context of allowing makeup parenting time to defendant, and did so separately from the issue of custody, an evaluation of which was to occur within weeks. There is no indication that the order would potentially cause a change in the child's established custodial environment. Further, this case does not appear to relegate plaintiff "to the role of a 'weekend' parent," *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008), where the circuit court here issued the order with the intent to allow makeup parenting time to defendant after plaintiff unilaterally withheld it. Plaintiff makes the argument that the practical effect of the order flipped the parties' custody arrangement without the benefit of a hearing. However, in contrast to *Rains*, here the trial court's decision did not implicitly deny a motion to change custody.

We acknowledge that Michigan recognizes both physical and legal custody. See *Foxall v Foxall*, 319 Mich 459, 460-461; 29 NW2d 912 (1947). Additionally, the Uniform Child–Custody Jurisdiction and Enforcement Act, MCL 722.1102(c) and (d), references both legal and physical custody, along with parenting time, in its definition of a child custody case: 'Child-custody proceeding' means a proceeding in which legal custody, physical custody, *or parenting time* with respect to a child is an issue." (Emphasis added.) This Court relied on that definition in *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010), when reviewing a parenting-time determination as part of a custody decision.[7] Later, in *In re AJR,* 496 Mich 346, 354-363; 852 NW2d 760 (2014), our Supreme Court discussed the divisibility of the concept of custody,

[7] Notably, *Shade* involved the denial of the defendant's motion to change physical custody along with the modification of the parenting time schedule, so *Shade* was not limited to a dispute over parenting time. Further, the trial court in *Shade* had held a de novo hearing. Therefore, *Shade* is distinguishable from this case, where the trial court had not had the opportunity to hold a hearing or rule on custody before issuing the makeup parenting time order.

observing that physical custody concerns a child living with a parent, while legal custody concerns decisions that significantly affect the child's life. *In re AJR* reinforces that physical and legal custody are distinct concepts. Further, the language used in the Uniform Child–Custody Jurisdiction and Enforcement Act ("legal custody, physical custody or parenting time") supports that parenting time also is a distinct concept to be considered in the context of legal and physical custody. It follows that, had our Supreme Court intended the court rule to embrace both distinct concepts, it would have so stated.

More recently, this Court addressed legal and physical custody in *Varran,* 312 Mich App 591, in a matter involving grandparenting time. In the absence of a definition of "custody" in MCR 7.202(6)(a)(iii), this Court referred to the following dictionary definition of custody:

> [Custody is the] care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody [usually] grants both rights. [*Varran*, 312 Mich App at 604, quoting *Black's Law Dictionary* (10th ed) (formatting altered).]

The *Varran* Court also referenced *Grange Ins Co of Mich v Lawrence,* 494 Mich 475, 511; 835 NW2d 363 (2013), which noted that the Child Custody Act distinguishes between physical custody (where the child resides) and legal custody (decision-making authority regarding important decisions relating to the child's welfare). The *Varran* majority pointed out that MCR 7.202(6)(a)(iii) did not limit the term "custody" to physical custody, and therefore reasoned that an order appealable by right included "an order that produces an effect on or influences in some way the legal custody *or* physical custody of a minor." *Varran*, 312 Mich App at 604 (emphasis in original). Under that construction, the Court concluded that an order regarding grandparenting time interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of the child and thus is a postjudgment order affecting the legal custody of a minor. *Id.* at 606. *Varran,* however, is distinguishable. Because *Varran* involved a grandparenting time issue, which is "markedly different" from a custody dispute between two parents, see *Falconer v Stamps*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 323392), it simply is not on all fours with the case at bar, a case involving makeup parenting time between two parents.

The utilization of legal custody as a basis for this Court's jurisdiction for a claim of appeal by right broadens the definition of custody. An expansive definition could include all manner of decisions regarding the child, allowing appeals by right to be taken from decisions, for example, whether to allow a child to attend one specific summer camp over another; whether to allow a child to participate in travel soccer; whether one parent or the other would pick up the child from school; or from decisions regarding "how to treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child," *Varran*, 312 Mich at 607. An extension of this Court's jurisdiction to incorporate legal custody would so expand the rule as to nullify the qualifying language "affecting the custody of a minor." To extend the court rule to encompass

all postjudgment decisions regarding minors in domestic relations appeals would be to return to the jurisdictional standard before the amendment of the court rule.[8]

Had our Supreme Court intended that parenting time orders be appealable by right, it would have included parenting time in the court rule. Absent that language, we decline to read "parenting time" into the plain language of the rule. See *PIC Maintenance, Inc v Dep't of Treasury,* 293 Mich App 403, 410-411; 809 NW2d 669 (2011) (maintaining that courts should not add words into a statute).

The order appealed in this case sets forth a framework for a *future* custody decision, pending the psychologist's report and a custody trial. Once the custody order enters, a claim of right may be taken. In the meantime, the circuit court has issued an interim order regarding makeup parenting time. Presumably, the case has moved forward in the circuit court in accordance with its order for a custody evaluation and a custody hearing. Further, the issue may at this time be moot,[9] as months have passed and the court may have issued further orders regarding parenting time. All of these factors weigh in favor of our ruling that jurisdiction via a claim of appeal by right is improper here.

In declining jurisdiction pursuant to MCR 7.202(6)(a)(iii), we have not barred access to the appellate courts, where an application for leave to appeal is available to challenge a trial court's decision regarding parenting time. An application for leave to appeal in this Court receives review and analysis by District Commissioners, who are experienced court staff attorneys, before submission to a judicial panel, which generally considers the merits in the context of deciding whether to grant or deny leave, or order other peremptory relief, in an order. Consequently, parties filing applications receive access to appellate review in this Court. To the extent the issue is not now moot, plaintiff here is free to file a delayed application of the circuit court's parenting time decision and obtain appellate review of that application in accordance with the above-described procedures.

IV. CONCLUSION

We dismiss this claim of appeal for lack of jurisdiction. We have chosen not to exercise our discretion to treat the claim of appeal as an application for leave to appeal and grant the application, *Pierce v City of Lansing,* 265 Mich App 174, 183; 694 NW2d 65 (2005), but instead dismiss this claim, an option included in our Supreme Court's order. We have determined that this Court lacks jurisdiction over this parenting time order and the appeal is properly dismissed.

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[8] Before 1994, most postjudgment domestic relations orders were appealable by right. The Staff Comment to the February 1994 amendment to MCR 7.203 indicates that the court rule change "eliminates appeals of right as to certain types of judgments or orders. . . . In domestic relations cases, the only postjudgment orders that will be appealable by right are those involving the custody of minors."

[9] An issue is moot and generally will not be reviewed if this Court can no longer fashion a remedy for the alleged error. *Silich v Rongers*, 302 Mich App 137, 151; 840 NW2d 1 (2013).

Dismissed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Colleen A. O'Brien

T A B C

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Michael Franck
Executive Director

October 7, 1993

Hon. Michael F. Cavanagh, Chief Justice
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Re: Report of the State Bar of Michigan Task Force on Appellate Courts

Dear Chief Justice Cavanagh:

I formally transmit the Task Force Report which was approved by the Representative Assembly at its meeting on September 30, 1993, with minor amendments incorporated in the copy forwarded. Most of the recommendations require implementation by new or amended court rules. Recommendations 10, 12, 13 and 18 can be implemented only by legislation. Recommendations 3 and 11 require both legislation and court rule changes for implementation. We are proceeding to initiate efforts to obtain enactment of the legislative initiatives.

The success of recent efforts to obtain legislation increasing the number of judges in the Court of Appeals and the funding for the Court as well as funding for other aspects of the administration of justice has created a momentum which should if at all possible be maintained. To that end, we respectfully request that the Court take up the court rule recommendations contained in the Task Force Report as promptly as possible.

The full resources of the State Bar are available to provide such additional information and assistance as the Court may desire.

Respectfully submitted,

Michael Franck

MF:kw
Enclosure

xcs: Charles L. Levin, Associate Justice
James H. Brickley, Associate Justice
Patricia J. Boyle, Associate Justice
Dorothy Comstock Riley, Associate Justice
Robert P. Griffin, Associate Justice
Conrad J. Mallett, Jr., Associate Justice
Martin M. Doctoroff, Chief Judge, Court of Appeals
Corbin R. Davis, Clerk
Al Lynch, Chief Commissioner
Marilyn K. Hall, State Court Administrator

REPORT OF THE STATE BAR OF MICHIGAN TASK FORCE ON THE APPELLATE COURTS

HISTORY OF TASK FORCE

In October, 1992, President of the State Bar of Michigan George Googasian recommended to the Bar Commissioners that a Task Force be formed to study the problems in the Michigan Court of Appeals and the Michigan Supreme Court. He explained that the Michigan Court of Appeals now had a backlog in excess of 4,000 cases; that the time from filing an appeal to decision was well in excess of two years, and longer for more complex cases. He expressed concern that the increased administrative responsibilities of the Michigan Supreme Court had resulted in a diminished number of appeals being considered by that Court. He noted that Supreme Court Administrative Order 1990-6, which required that any conflicts in opinions of the Court of Appeals be resolved in favor of the first opinion of a panel of the Court of Appeals, did not resolve with certainty questions of law that should be heard in the Supreme Court to establish binding precedent. He expressed concern about the number appeals from pleas of guilty pending in the Court of Appeals. Other problems were outlined, including the apparent lack of an adequate number of judges and administrative support in the Court of Appeals.

The Task Force was charged with the responsibility of examining the problems, making recommendations and providing suggestions for improvement of the appellate system. It was instructed to complete its work by September 1, 1993. Its initial meeting was held in December, 1992, and it has met monthly since then. The final recommendations were adopted in August, 1993. The members of the Task Force were:

Robert B. Webster, Chairperson
Joan Ellerbusch Morgan, Reporter
Lawrence Bryan
David M. Lawson
Kathleen McCree Lewis
Robert W. Powell
Neal Shine
Arthur J. Tarnow
Marica Turner
Dawn A. Van Hoek
George E. Ward

OPERATION OF TASK FORCE

The Task Force met with the Chief Justice of the Michigan Supreme Court, Honorable Michael F. Cavanagh, and the Chief Judge of the Court of Appeals, Honorable Martin M. Doctoroff. Justice Cavanagh and Judge Doctoroff shared their views of the difficult problems facing both courts, and assured the Task Force of the cooperation of their Courts, and administrative staffs. The Task Force asked each Committee and Section of the State Bar to submit their comments or suggestions. Comments were solicited from the entire membership of the Bar, from each of the Justices and Judges of the two Courts, and each of the separate judges associations, i.e. probate, district and the Michigan Judges Association. The Reporter of the Task Force worked with the Administrative staffs of the two Courts to obtain information responsive to questions of members of the Task Force; and also sought information from national court organizations and appellate courts in other states as to innovative procedures developed elsewhere. A public hearing was held in June, 1993, in Lansing, and many comments of various interested groups were received.

From these sources the Task Force gained insight as to the problems of the appellate courts and developed its recommendations. A recurrent problem was found in the absence of statistical information that the Task Force felt was necessary to determine where the resources

of the Court of Appeals should be properly focused. For example, one-half of the appeals filed in that Court are resolved without submission to the Court for decision. The Task Force felt that identification of the types of cases and time of settlement or other disposition would be helpful, so that resources could be diverted from cases that were going to resolve without judicial attention. Apparently there is no tracking of this kind of information in the Court. Additional funding for statistical systems would certainly appear to be cost effective, and it is hoped that the Executive and Legislative branches would favorably consider a request for that purpose at the Court of Appeals level.

TASK FORCE RECOMMENDATIONS

The Task Force sought solutions to the problems of the appellate courts caused by an overwhelming increase in dockets; and at the same time recognized that an increase in judicial personnel and funding would certainly be inevitable. It recognized that before the Executive and Legislative branches would consider added resources for these Courts, both branches would have to be satisfied that the Courts have done everything they can to resolve their problems internally. The Task Force's recommendations are its best judgment of those immediate solutions that can effect some reduction in the backlog of the Court of Appeals and relieve the Supreme Court of some of its ever-increasing administrative burden.

The increase in civil litigation, and the sharp increase in criminal cases, have burdened our court system at every level. The State's funding commitments have been concentrated at improving the level of law enforcement in drug-related and other crimes, and at complying with Federally mandated prison population standards. In the criminal justice system the two ends of the conduit of justice, prosecution and punishment, have received sharply increased funding. The middle of the system, the adjudicative function, has not received commensurate increases in its funding. When the Executive and Legislative branches are satisfied that the courts are doing everything possible to be efficient, they should be willing to approve increased funding to relieve the problems caused by these societal factors. The Task Force recommendations, including both internal changes in our system of justice and its administration, and increased commitment of public resources to the judicial system, including more judges, is an integrated and balanced proposal, designed to minimize cost and maximize efficient delivery of equal jusice to all.

Certain of the recommendations of the Task Force deserve special comment.

The Task Force addressed the problem of appeals of right from pleas of guilty in criminal cases. There is no question the public does not understand why there should be a high volume of appeals where a person has admitted his or her guilt. Most of these appeals are really sentence appeals. Persons who plead guilty often contend that their sentences are not what they expected or are otherwise defective. A very small portion of the guilty plea appeals relate to questions of whether the plea was coerced, whether the defendant was guilty of all of the elements of the offense, or was competent to plead. The Task Force determined that this latter category of cases should have an appeal of right, but that the so-called sentence appeals should be heard only on application for leave to appeal, in those cases where the defendant knew what his sentence would be at the time of his plea of guilty. The Task Force recommends that the trial courts increase their use of pre-disposition investigation reports, so that when a defendant pleads guilty, he or she will know the sentence to be imposed and will forfeit any appeal of right. The Task Force recognized that the Court of Appeals has met the challenge of guilty plea (sentence) appeals by the use of panels of retired judges to determine these cases, but they still clog the appellate dockets, and their numbers can be reduced by adoption of these recommendations.

The Task Force recommends that the Court of Appeals establish Summary and regular tracks for the processing of cases. An early determination would be made from a required docketing statement filed by the parties to the appeal, as to whether the case could be decided summarily, because of the absence of complex issues, or whether it should be processed as a

regular appeal, with full briefing and oral argument. If a case were assigned to the Summary track, a settlement conference would be scheduled. If the case is not settled, the Court could issue a proposed opinion to the parties for comment, and after comment, issue an opinion without oral argument. At any point the case could be transferred to the Regular track, if the Court was convinced that the case was sufficiently complex that it needed that attention. The Task Force recommends settlement conferences on both Summary and Regular tracks.

The Task Force recommends that the jurisdiction of the District Courts be increased to include civil cases where the amount in controversy is $25,000. The present jurisdictional amount is $10,000. This change can result in a decrease in the number of cases appealed to the Court of Appeals, since appeals of right from the District Courts are only to the Circuit Court. The jurisdictional amount has been the same for many years and an inflationary adjustment is warranted. The District Judges have indicated that they are supportive of this change if the mediation rules are amended to avoid the remanding of complex cases that require lengthy trials to the District Court. The Task Force has recommended that cases where more than a two day trial is anticipated, not be remanded to the District Court from Circuit, even though the case is mediated below $25,000.

Regarding the Supreme Court, the Task Force has recommended changes in appellate procedure that are responsive to criticisms regarding the resolution of conflicting opinions in the Court of Appeals, and has made recommendations that should relieve the Court of some administrative burdens.

The Task Force recommends that Administrative Order 1990-6 be repealed and the court rules be amended to provide that in the case of a conflict in opinions of panels of the Court of Appeals, the so-called "Sinai Hospital" procedure be followed, providing for an opinion from the entire Court of Appeals to resolve the conflict. It has recommended that where this procedure is followed, a vote of only 3, as opposed to the present requirement of 4, justices be required to grant leave to appeal from the Court of Appeals to the Supreme Court. This procedure should assist the Supreme Court in establishing binding precedent and eliminating uncertainty as to the rule of law.

The Task Force recognized the increased administrative responsibilities of the Supreme Court, which has detracted from its constitutional decisional responsibilities. It has recommended that a Rules and Administrative Council be established, whose recommendations as to governance of the state court system would be final unless four justices (a majority) of the Court voted against them. The Council would also have rule making power, subject to the same right of a majority of the justices to disapprove. The Council would be comprised of the Chief Justice, the Chief Judge of the Court of Appeals, a representative of the State Bar, and a representative of the trial courts rotating among the circuit, probate and district courts. This Council would be respnsible for the non-adjudicative functions of the court system, i.e. its administration, in conjunction with the State Court Administrator's Office.

The Task Force strongly felt, after consideration of all of the many problems facing our appellate system that there must be a commitment to increased resources for the Court of Appeals at this time. Chief Judge Doctoroff has stated that if the Court of Appeals could have an increased budget of approximately $3,000,000 it could solve the immediate problems of the backlog without increased judicial personnel. It should have that increase. He also has stated that this increase in budget would not permanently solve the problems of the Court. The Task Force agrees with that conclusion, and recognizes the need for additional judges, even with the adoption of all of its recommendations. The Task Force has declined to quantify the number of judges and support personnel needed, and relies on the expertise of all branches of government to reach that conclusion.

Other recommendations were adopted, all of which are included in the formal recommendations which follow this summary.

IMPLEMENTATION

The recommendations of the Task Force will be forwarded to the Representative Assembly of the State Bar for its consideration at its September, 1993 meeting. If the proposals are approved by the Representative Assembly, then they will be forwarded to the Supreme Court and to the Legislature for consideration of those bodies as to any necessary changes in court rules and legislation to implement the recommendations. If the Representative Assembly adopts the proposals they will be State Bar policy affecting the administration of justice, and the Bar will work for their adoption in the Legislature and encourage the Supreme Court to give them favorable consideration.

ACKNOWLEDGEMENTS

The Task Force expresses great appreciation to the staffs of the Supreme Court, the Court of Appeals, and the State Court Administrator's Office, for their assistance to it and to its Reporter. As Reporter to the Task Force, Joan Ellerbusch Morgan has worked long and hard at writing drafts and obtaining information that made these recommendations possible. She deserves great praise for her work. The State Bar of Michigan contributed significant resources to the work of the Task Force, and demonstrated its continuing dedication to the administration of justice. Michael Franck, Executive Director of the State Bar, was dedicated in his attention to the work involved, and his wisdom was of great assistance. The sections and committees of the Bar that commented and made proposals were of great assistance. Many interested groups of lawyers commented on the work of the Task Force, as well as individual attorneys and judges. Their efforts were of great assistance.

The Chair of the Task Force will ever be grateful to the members, who often expressed disagreement with various proposals, but conducted debate with civility and in a constructive manner at all times. The members of the Task Force worked hard during the short time allotted to it to accomplish its work, and deserve great praise for their willingness to take time from their practices, employment and families to assist in the improvement of our system of justice.

1. Guilty Pleas.

RECOMMENDATION: Where the court informs the defendant, before his plea, of the exact sentence to be imposed, and where that sentence is imposed, the defendant may appeal the sentence only by leave, although the defendant may challenge the plea or sentence by right under circumstances presently allowed to challenge consent judgments, such as where coercion, duress, or mistake, is alleged. The rights to counsel and to a transcript of the proceedings would remain in both types of appeals, and, where there is no objection by the prosecution to the sentence at the time of its announcement, the prosecution would also waive its appeal by right.

Commentary: There has been a great deal of discussion in the past few years regarding the elimination of appeals as of right from guilty pleas. Appeals from guilty pleas are the largest single type of case on the Court of Appeals docket; approximately 4400 are filed each year. The Task Force concluded that this right should be retained, as set forth in Const 1963, art 1, sec 20, and People v Smith, 402 Mich 72 (1977); except in cases which are comparable to consent judgments in civil cases, as set forth above. Since the overwhelming majority of guilty plea appeals involve sentencing issues only, the Task Force anticipates that the effect of this recommendation will be to reduce the Court of Appeals caseload. In this regard, the Task Force encourages the adoption of trial court procedures to allow judges to inform the defendant of his sentence, including the use of presentence disposition reports. Proposed changes to MCR 6.302 are set forth in the Appendix. A segment of the Task Force believes this rule should be mandatory for every guilty plea.

2. Concurrent Jurisdiction In Criminal Cases.

RECOMMENDATION: Increase a trial court's concurrent jurisdiction in criminal cases by extending the time for filing a motion for new trial or resentencing to 56 days.

Commentary: By permitting a greater "window" for motions to be heard in the trial court, the Court of Appeals will be relieved from deciding the number of Motions to Remand which are filed because the current 28 day time period is so short. This could be accomplished by inserting "56 days" for "28 days" in MCR 7.208(B)(1).

3. Administrative Appeals.

RECOMMENDATION:

A. Where a "double" right to appeal exists under current law, the second appeal as of right should be eliminated.

B. There should be a uniform and consistent appellate process for all administrative agency actions. The "appellate process" and "appeals" in this context include all petitions for review, appeals, and extraordinary writs based on the administrative agency action or inaction.

C. All time frames for appealing administrative action or inaction to the Court of Appeals should be 21 days.

D. Venue in all appeals of administrative action involving a state agency should be made consistent. Venue should be either the plaintiff's county of residence or Ingham County. MCL 600.631.

E. All appeals of administrative agency action or inaction, including appeals based on the Administrative Procedures Act, should be to the circuit court.

F. Appeals to the Court of Appeals of circuit court appellate decisions of agency action or inaction should be by leave only.

Commentary: Procedures for appellate review of administrative appeals is less consistent than any other area of law. The Task Force's recommendations in this area are designed to eliminate two appeals as of right and to provide some consistency in this area and are not meant to change the standard of review. The Task Force recommendations are consistent with those made by the 21st Century Commission.

4. Change Definition of Final Order in Post-Judgment Domestic Cases.

RECOMMENDATION: Only custody issues in post-judgment domestic relations cases should be appealable by right; all other orders entered post-judgment should be appealable only by leave.

Commentary: By amending the definition of "final judgment" in MCR 7.203, as set forth in the Appendix, the Court of Appeals docket will be reduced. Support issues may be easily ascertained by the Child Support Guidelines, resulting in a mechanical application which can be readily determined, and for which applications by leave would be more appropriate.

5. Separate Rules For Tracking and Processing Civil And Criminal Cases In Court Of Appeals.

RECOMMENDATION: Separate rules should be made for tracking and processing civil and criminal cases in the Court of Appeals, and there should be early tracking, by type of case.

Commentary: Certain procedures, such as settlement conferences and docketing statements, may be appropriate in civil cases but not in criminal appeals. The Task Force recommends that separate rules be enacted to recognize that a variety of appellate measures may be appropriate, depending on the type of case.

6. Docketing Statement In Civil Cases.

RECOMMENDATION: In civil cases, a docketing statement, which gives basic information about the case, must be filed within 28 days of filing the claim of appeal, in order to collect information about whether a case should be expedited.

Commentary: By ordering that a docketing statement be filed in all civil cases, the Court of Appeals will be able to make an early determination as to whether settlement should be explored, and whether the case should be placed on a particular appellate track. The docketing statement should state the errors claimed, the determinative factual and legal issues involved, the number of days of trial, witnesses, and exhibits, the number of anticipated pages of transcript, and the evidence required to develop the determinative issues.

7. Summary And Regular Tracks in Civil Cases.

RECOMMENDATION: To promote the expeditious disposition of uncomplicated cases, a summary and regular track should be implemented in the Court of Appeals. Early screening of appeals should be done to identify those cases which might be amenable to expedited or summary treatment. For examples of possible procedures, see the Appendix.

A. The General Features of the Summary Track:

1). Settlement conferences for those cases identified as having potential for disposition by independent/confidential process or other forms of alternative dispute resolution.

2). Releasing "decisional" court memoranda or proposed opinions to counsel for comment in advance of final decision.

3). Final decision would occur without oral argument. After the comment period, the court would have three options: a) reissue its proposed opinion as a final decision; b) issue a final modified opinion; or c) transfer the case to its regular docket.

B. The General Features of the Regular Track:

1). Cases on this track are of jurisprudential significance and would be assigned to non-visiting Court of Appeals judges.

2). Before oral argument, proposed opinions Bench Memos would be distributed to appellate counsel.

3). Decisions would be expected within 56 days of oral argument.

4). Cases identified on this track could be referred to an independent/confidential Settlement Division; it would also be possible to refer to Summary Track.

C. Motions for affirmance and peremptory reversal would not delay the processing of a case through its track.

Commentary: The Task Force discussed a number of suggested procedures for expediting the processing of certain civil cases. A summary track is appropriate for cases involving common or simple factual and legal issues, and should be used in these cases unless the litigants persuade the court that the case should be transferred to the regular track.

The Task Forces's discussion focused on the benefit of early intervention in appeals balanced against the cost of staffing necessary to implement such procedures. Although early intervention is the necessary component of a system which separates cases into expedited and conventional tracts, and identifies those cases which might be amenable to ADR, the cost of staff necessitated in a high-volume appellate system may be prohibitive.

One way to alleviate the cost is to resort to volunteer lawyers, or retired judges paid by "user fees". This feature is a component of the State Bar Civil Procedure Committee Proposal. Another point made by Task Force Committee members is that training be required. If the evaluators are paid, non-staff persons, th Court may require the evaluators to pay for the training themselves. Further, the ADR Section of the State Bar has volunteered their services as well.

In all events, evaluators and conciliators must be trained in the features of ADR and otherwise well-qualified in areas of substantive law and appellate practice and procedure. The recommendations of the State Bar's Representative Assembly, intended to increase participation of women and minorities, should also be incorporated into this selection process. Ms. Lewis concurs generally in the concept of a pre-briefing conference.

8. Amend Claim of Appeal Form and Provide Access to Complete Transcripts and Exhibits.

RECOMMENDATION:

A. In criminal cases in which the defendant exercises the right to appeal, complete transcripts of all court proceedings must be automatically prepared and filed with the court. Amend MCR 6.425(F)(2) and the "Claim of Appeal Form" to require preparation of a transcript for all court proceedings.

B. In criminal cases in which the defendant exercises the right to appeal, access to trial exhibits must be provided. Documentary exhibits submitted by either party at trial must remain with the official trial court file, and be provided to appellate counsel with other records. Non-documentary exhibits must be preserved by the party which obtained their admission, for a reasonable period of time. Access to appellate counsel must be provided by either party, upon request. A neutral depository for that purpose should be established.

Commentary: Numerous circuit courts (Genesee, Kent, Calhoun, for example) will not order preparation of transcripts of jury voir dire or motion hearings unless appellate counsel submits a written request, stating good cause. Since appellate counsel is rarely the same as trial counsel, he or she cannot reliably know what occurred, and cannot supply reasons for access to the record. Ironically, appellate courts have steadily expanded the scope of review for voir dire issues, while trial courts restrict the ability to raise them. The practice appears to be driven by cost alone, since the law firmly supports complete access. Restricting access creates costly delays, since appellate counsel must litigate denial of the transcripts.

In some circuits, appellate counsel has been forced to file post-conviction motions for discovery of exhibits actually admitted at trial, following the refusal of police and prosecutors to provide copies of documents other exhibits. Appellate counsel often is different than trial counsel, and legitimate appellate claims may surround the exhibits. Denying access to what is a public record, causing appellate counsel the matter, costs all participants and delays the process. MCR 7.210(C) should be amended to provide for this, as set forth in the Appendix.

9. Computer Access to Docket Information.

RECOMMENDATION: The Court of Appeals should allow remote computerized access to docket information.

Commentary: Appellate attorneys and any member of the public wishing information about a docketed case must speak directly with a court clerk, even if the information is no more complicated than a date set for oral argument. Courts across the country and within the state [Washtenaw Circuit and Recorder's, for example], permit access to the docket database via modem. The practice can be supported by user fees, security issues are easily solved, and clerks can devote themselves to more important matters.

10. Add New Judges and Staff To The Court Of Appeals.

RECOMMENDATION: There is no question that the Court of Appeals needs more resources, including funding for new judges and support staff. These resources alone will not solve all of the problems facing the Court, but they must be added to restore the Court to its previous stature as a prominent intermediate state appellate court.

A. The Court of Appeals should be staffed by permanent appellate judges.

B. To address the Court's permanent caseload, more judges and sufficient support staff should be added.

C. To deal with the immediate crisis, additional staff should be made available to support visiting judges. While sitting on the Court of Appeals, visiting judges should not receive additional compensation to that which they regularly receive.

Commentary: The number of judges on the Court of Appeals, with support staff, must be increased to address the tremendous increase in the court's caseload. The use of temporary judges and staff is designed to address the court's backlog, which is an immediate need. To address the court's long term caseload increases, however, permanent judges and staff must be added.

11. District Court Jurisdictional Amount.

RECOMMENDATION: Increase district court jurisdiction to $25,000.00. Amend Michigan Court Rule 4.003 regarding remands from circuit court to district court, discovery in district court, and appeals of remand orders and provide for mediation. Cases should not be remanded from circuit court where the trial is expected to last more than two days. Expand jurisdiction in district court to allow requests for equitable relief ancillary to legal relief to be filed originally in district court.

Commentary: By increasing the jurisdiction in district courts, appeals arising from those cases will be to the circuit court, eliminating some of the caseload of the Court of Appeals. The suggested change to the language of the court rule are set forth in the Appendix.

12. Value Distinction Between Misdemeanors And Felonies.

RECOMMENDATION: Increase the line of demarcation between felonies and misdemeanors in theft crimes from $100 to $1,000.

Commentary: The proposed increase is consistent with other jurisdictions which have recently raised this monetary threshold. Because more cases would be heard in the district courts, appeals of right from these cases would go to the circuit courts, reducing the Court of Appeals caseload.

13. Decriminalization Of Ordinance Violations.

RECOMMENDATION: Enact legislation decriminalizing certain municipal ordinance violations, permitting them to be treated as civil infractions.

Commentary: This proposal will also result in more cases being heard in the district courts, with any resulting appeals being taken to the circuit courts, relieving the Court of Appeals of some cases.

14. Resolving Conflicting Opinions of the Court of Appeals.

RECOMMENDATION: The "first-out" procedure established by Administrative Order 1990-6 should be eliminated and conflicting reported Court of Appeals decisions should be resolved through the conflict resolution procedure described in Lowry v Sinai Hospital, 129 Mich App 726 at 730, n4 (1983), as modified below. The Sinai Hospital

procedure provided that the presiding judge of a panel which agrees that an opinion conflicts with a prior published Court of Appeals opinion shall inform the Chief Judge and Chief Clerk and, if the Chief Judge agrees there is a conflict, the entire court shall vote for one of the two opinions.

The Sinai Hospital procedure should be modified to authorize the full Court of Appeals to decide that no conflict exists.

MCR 7.215 should be amended to provide that if, within 21 days after issuance of a published opinion, a party moves for rehearing on the basis that the opinion is in conflict with a previously published opinion, the court may grant rehearing to determine if the Sinai Hospital procedure should be followed.

A case which has been through the Sinai Hospital procedure, whether initiated by the court or a party, would be a "conflict case" eligible for 3-vote determination by the Supreme Court on application for leave to appeal.

Commentary: There has been a great deal of recent discussion on AO 1990-6, much of it unfavorable. This proposal, in conjunction with Recommendation 15, would facilitate resolution of conflicts in the Court of Appeals and, ultimately, by the Supreme Court. Suggested amendments to MCR 7.215 are set forth in the Appendix.

15. Three Votes To Grant Leave.

RECOMMENDATION: The Supreme Court has been legitimately criticized for not deciding a sufficiently large number of appeals. In order to expand the number of cases heard by the court and to facilitate its resolution of important legal issues, applications for leave to appeal to the Supreme Court should be granted on a vote of three justices only in "conflict cases", as defined in Proposal 14, above.

Commentary: The percentage of cases which receive review by the Supreme Court is quite low, Kelman, "Case Selection by the Michigan Supreme Court: the Numerology of Choice", Detroit College of Law Review, Vol 1, Spring 1992. There are many reasons why the Supreme Court should review a case: to resolve conflicts in the Court of Appeals, to set precedent for the bench and bar, and to establish the Court's position as the court of last resort in the State. If leave were granted on three votes in conflict cases, the Court could review more

cases, fulfilling its role of providing definitive authority in many areas of law. The Rules and Administration Council, recommended by the Task Force, would relieve many of the Court's present administrative burdens.

16. Rules and Administrative Council.

RECOMMENDATION: A Rules and Administrative Council should be formed, whose recommendations would be passed unless four of the seven Supreme Court Justices voted against them. The Council would be comprised of the Chief Justice, the Chief Judge of the Court of Appeals, the State Court Administrator,the Supreme Court Clerk, the Clerk of the Court of Appeals, a representative of the State Bar, and a representative of the trial courts, rotating between the circuit, probate, and district courts. The Council would be responsible for the non-adjudicative functions of one court of justice, and, once recommendations are made to the Supreme Court, if a majority of the Court does not reject them within 90 days, they shall take effect.

Commentary: The use of a Rules and Administrative Council would relieve the Justices from the burden of administrative matters, allowing them to devote a greater amount of time to case consideration.

17. Indigent Criminal Applications For Leave.

RECOMMENDATION: Appointed criminal appellate counsel should be required to file an application for leave to appeal an unfavorable Court of Appeals decision if (1) in his or her professional judgement and good faith belief the case involves an issue of jurisprudential importance or clear error; and (2) the client requests such further appeal. The court rule imposing this requirement, MCR 6.425(F)(1)(c), should provide that appointed counsel be paid from public funds for such representation.

Commentary: The Supreme Court eliminated the former practice of allowing indigent criminal defendants who are incarcerated to request review by "letter requests" when it repealed MCR 7.303 effective April 1, 1990. This has resulted in a dramatic reduction in the number of applications for leave filed in criminal cases. The recommendation is consistent with the procedure followed in almost every other state, which provides for appointed

counsel to seek discretionary review in those cases which merit it.

18. Supreme Court Should Sit in Lansing.

RECOMMENDATION: Establish a Hall of Justice in Lansing to house the Michigan Supreme Court and its entire staff, including the State Court Administrator's office. Once the centralized facility has been established, eliminate the separate facilities for court staff and phase out the offices for members of the Court outside Lansing as the term of each incumbent expires.

Commentary: The Michigan Supreme Court is currently scattered throughout the state. The Court itself is located in cramped quarters in the Law Building in Lansing. Its Commissioners are located in a totally different facility. The Court Administrator's office is located in still another locale. The Justices themselves have offices throughout the state and come together for administrative conferences only once a week. This is an ineffective and an inefficient way to operate a court, particularly one which requires the participation of every member in every decision made. The Court and its staff should function in a single, centralized facility.

19. Status Reports.

RECOMMENDATION: Chapters 7 and 8 of the Michigan Court Rules should be amended to require:

1. That the Court of Appeals file, with the State Court Administrator and the Rules and Administrative Council, quarterly opinion status reports on any matter not decided within six months of its submission to a panel. The report should identify the date of submission and panel to which the case is assigned.

2. That the Supreme Court file, with the State Court Administrator and the Rules and Administrative Council, quarterly status reports on the disposition of leave applications, indicating when each application was filed, whether it was from a published or unpublished Court of Appeals decision, and should identify leave applications and calendar cases not disposed of within six months of submission and should indicate the date of submission. The reports should also state the status of all administrative matters pending, including the date each matter was submitted to the

Court and the subject matter of administrative matters pending.

Commentary: The Task Force recognizes that the lack of public recordkeeping hinders accountability of the appellate courts. The Michigan State Court Annual Report provides thorough information for the trial courts of this State, but similar information is lacking for the appellate courts. By compiling and providing such information, the courts will improve their ability to effectively manage their dockets.

20. Publication Of Internal Operating Procedures.

RECOMMENDATION: The Supreme Court and Court of Appeals should publish their internal operating procedures.

Commentary: This recommendation, like Recommendation 13, recognizes that public confidence in the judiciary is increased as courts publish their internal procedures. To accomplish this goal, adoption of this recommendation is urged. Many other courts, including the Sixth Circuit, publish their Internal Operating Procedures, which have become a helpful tool for those attorneys practicing in the court.

21. Judicial Productivity.

RECOMMENDATION: MCR 7.201(A) should be amended to give the Chief Judge of the Court of Appeals the authority given to Chief Judges of Circuit Courts under MCR 8.110(E)(1) through (4).

Commentary: By empowering the Chief Judge of the Court of Appeals to supervise the judges of that court, the Task Force hopes that increased individual accountability will result, again creating confidence in the judicial system.

TAB D

Order

Entered: December 30, 1994

94-55

Amendment of MCR 6.301, 6.302, 6.311, 6.425, 7.203, 7.204 and 7.205

On order of the Court, the need for immediate action being found in view of the absence of legislative action clarifying the Legislature's position regarding the right to appointment of counsel in guilty plea cases in light of the November, 1994 amendment of Const 1963, Art I, § 20 and the enactment of 1994 PA 374 and 1994 PA 375, the publication requirements of MCR 1.201 are dispensed with. To preserve the issue of appointment of counsel and payment therefor pending legislative clarification, we adopt, on an interim basis, the following amendments of MCR 6.301, 6.302, 6.311, 6.425, 7.203, 7.204 and 7.205 applicable to crimes committed on or after December 24, 1994 as provided by 1994 PA 374 and 1994 PA 375. Interested persons are invited to submit comments to the Clerk of the Supreme Court. The interim amendments will remain in effect until further order of the Court after consideration of comments and legislative action, if any, or until April 1, 1995.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

Rule 6.301 Available Pleas

(A)-(B) [Unchanged.]

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) [Unchanged.]

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to

which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) [Unchanged.]

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:

(1)-(3) [Unchanged.]

(4) That any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.

(C)-(F) [Unchanged.]

Rule 6.311 Challenging Plea After Sentence

(A) Motion to Withdraw Plea. The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal. After the time for filing an application for leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.

(B)-(C) [Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(D) [Unchanged.]

(E) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to file an application for leave to appeal;

(b) if the defendant is financially unable to retain a lawyer, the defendant may request appointment of a lawyer to represent the defendant on appeal; and

(c) the request for a lawyer must be made within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) In a case involving a conviction following a plea of guilty or nolo contendere the court should liberally grant the request if it is filed within 42 days after sentencing.

(d) [Formerly (c), redesignated, but otherwise unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System.

(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in (F)(1) and (2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (F)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

Rule 7.203 Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, court of claims, and recorder's court, except a judgment or order of the circuit court or recorder's court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere.

A final order does not include an order entered after judgment has been entered in a domestic relations action, except for an order affecting the custody of a minor; or

(2) A final judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law.

(B)-(D) [Unchanged.]

(E) Appeals by Prosecution. Appeals by the prosecution in criminal cases are governed by MCL 770.12; MSA 28.1109, except as provided by MCL 770.3; MSA 28.1100.

Rule 7.204 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. The provisions of MCR 1.108 regarding computation of time apply.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(F)(3);

(b) within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(F)(1);

(c) within 42 days after entry of the judgment or order appealed from; or

(d) within 42 days after the entry of an order denying a motion for a new trial, for judgment of acquittal, or for resentencing, if the motion was filed within the time provided by 6.419(B), 6.429(B)(1), or 6.431(A)(1), as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(B)-(H) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. An application for leave to appeal must be filed within 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule.

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) 5 copies of an application for leave to appeal (one signed), stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2)-(3) [Unchanged.]

(4) 1 copy of certain transcripts, as follows:

(a) in an appeal from an order granting or denying a motion to suppress evidence in a criminal case, the transcript of all proceedings relating to the motion;

(b) in an appeal from the circuit court or recorder's court after an appeal from another court, the transcript of proceedings in the court reviewed by the circuit court or recorder's court;

(c) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(d) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence.

(C)-(E) [Unchanged.]

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), if an application for leave to appeal is filed more than 18 months after entry of the order or judgment on the merits, leave to appeal may not be granted.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing, if the motion was filed within the 18-month period, or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(F)(1) within the 18-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(F)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the docket or calendar entries, or other documentation showing that the application is filed within the time allowed.

STAFF COMMENT: The December 30, 1994 amendments of MCR 6.301, 6.302, 6.311, 6.425, 7.203, 7.204 and 7.205 modified procedure regarding appeals in criminal cases in light of the amendment of Const 1963, art 1, § 20 at the November 1994 general election and the legislation implementing the

constitutional amendment. Changes will remain in effect until April 1, 1995 and will be reconsidered by the Court in light of comments received and any further legislation.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 30, 1994

Clerk

TABE

STATE OF MICHIGAN

COURT OF APPEALS

JOHN ALLEN LIEBERMAN,

Plaintiff-Appellee,

v

KIMBERLY ANN ORR, formerly known as KIMBERLY ANN LIEBERMAN,

Defendant-Appellant.

FOR PUBLICATION
March 7, 2017
9:00 a.m.

No. 333816
Clinton Circuit Court
LC No. 13-024442-DM

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

BECKERING, J.

In this child custody matter, defendant Kimberly Orr appeals as of right the trial court's order granting plaintiff John Lieberman's motion to change parenting time and the children's schools.[1] Defendant contends on appeal that, not only did the proposed change affect the

[1] Plaintiff contends that the post-judgment order appealed from does not change the established custodial environment and, therefore, is not a final order appealable by right under MCR 7.202(6)(a)(*i*). In a one-page brief accompanying supplemental authority, plaintiff further argues that the order is not appealable under MCR 7.202(6)(a)(*iii*) pursuant to this Court's recent decisions in *Ozimek v Rodgers*, __ Mich App __; __ NW2d __ (2016) (Docket No. 331726), and *Madson v Jaso*, __ Mich App __; __ NW2d __ (2016) (Docket No. 331605). Plaintiff contends that these cases stand for the proposition that post-judgment orders affecting a change in schools (*Ozimek*) or a modification of parenting time (*Madson*) are not appealable by right. *Madson* involved an interim order providing for makeup parenting time while the parties prepared for a new custody determination and, therefore, is sufficiently distinguishable from this case as to be inapplicable. Although *Ozimek* is more to the point, plaintiff has overlooked one important exception to the general proposition he derives from *Ozimek*: an order affecting a change in schools that also affects "the amount of time spent between the child and either parent" affects custody and is appealable by right. *Ozimek*, __ Mich App at __; slip op at 5. Contrary to the dissent's implication, this Court dismissed *Ozimek* for lack of jurisdiction not simply because it involved a question of legal custody, but because the disputed order denying a motion to change schools did not affect custody. Such is not the case here. For the reasons set forth in this opinion, although the trial court characterized its ruling as merely a change of schools and a

established custodial environment the children had with her, but also by granting plaintiff's motion, the trial court effectively changed primary physical custody of the children from her to plaintiff without reviewing plaintiff's motion under the correct legal framework. We agree, and therefore, we vacate the trial court's order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

After the parties' marriage dissolved, the trial court entered a consent judgment of divorce in March of 2008 that awarded defendant sole physical custody and the parties' joint legal custody of the two minor children. The consent judgment gave plaintiff parenting time of one midweek overnight per week, every other weekend, four weeks during summer vacation, and alternating holidays. Minor modifications to plaintiff's parenting time schedule were made in 2008 and 2009.

In July of 2010, defendant moved to change the children's residence from East Tawas to DeWitt, where defendant had obtained a fulltime job. Plaintiff opposed the motion, and countered it with a motion to change custody. Plaintiff asked the court, among other things, to order psychological examinations for the parties and the children and an in camera interview with the children to determine their preferences. Stressing his present involvement and anticipated future involvement in the children's academic development, plaintiff asked the court to "[o]rder a change in custody that awards Plaintiff parenting time during the school year, and Defendant parenting time based upon the testimony elicited at hearing [sic] in this matter." Plaintiff appears to have withdrawn his motion subsequent to the parties' February 23, 2011 stipulated modification of parenting time. Pursuant to the terms of the modification, the children would continue to live with defendant during the school year, and plaintiff would receive parenting time three weekends per month during the school year and all but the first and last weeks of the children's summer vacation. The trial court entered a corresponding, modified uniform child support order showing that plaintiff had 140 overnights per year with the children, and defendant had 225.

In April of 2013, pursuant to a motion filed by the Iosco County friend of the court, the trial court entered an order transferring the parties' case to Clinton County.[2] In December of 2013, defendant filed a motion requesting parenting time on alternating weekends throughout the year. She based her request on allegations that plaintiff violated parenting time by not ensuring her telephonic access to the children during the children's summer vacation, and on her employer no longer requiring her to work weekends. Plaintiff opposed the motion, arguing that the proposed reduction in his parenting time from 140 to 88 days—a reduction of 52 days—would alter his established custodial environment with the children.

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modification of parenting time that did not affect the established custodial environment, the trial court's order did affect the custody of the minor children, and, therefore, is appealable as of right pursuant to MCR 7.202(6)(a)(*iii*).

[2] The court indicated to the parties in 2011 that, after resolution of a property matter unrelated to the instant dispute, a change of venue and transfer of the matter would be initiated as neither party resided in Iosco or an adjacent county. MCR 3.212.

The referee who heard defendant's motion noted that the parents shared joint legal custody, defendant had "primary physical custody," and plaintiff had parenting time as provided in the parties' February 23, 2011 stipulated agreement. The referee also found that there was an established custodial environment with each parent, and that the proposed 52-day reduction in plaintiff's parenting-time schedule would change the established custodial environment that the children had with him. Therefore, according to *Shade v Wright*, 291 Mich App 17, 25-28; 805 NW2d 1 (2010), resolution of defendant's motion was governed by the legal framework set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). Employing this framework, the referee found that defendant had failed to establish the proper cause or change in circumstances necessary to proceed to a hearing to determine whether a change in parenting time was in the best interests of the children. The trial court denied defendant's objection to the referee's recommendation, but told defendant that she could submit for the court's consideration an amended motion proposing a parenting time modification that did not alter plaintiff's established custodial environment. Defendant filed an amended motion, which the court rejected because it reduced plaintiff's parenting time by 20 days, from 140 to 120 days. The court stated that defendant could file a motion that reallocated plaintiff's parenting time, but not one that reduced it.

In May of 2016, plaintiff filed a motion to "modify parenting time and change schools," requesting "essentially that the parties swap the current parenting time schedule." Plaintiff based his motion on concerns about the children's academic opportunities and one child's academic performance. Plaintiff contended that the youngest child ended his fourth grade year in the 50th percentile in reading and 63rd percentile in math, and that the goal should be the 80th percentile. Plaintiff further observed that he had taken the child to Sylvan Learning Center to arrange for the tutoring the child needed to improve academically, and that he would be better than defendant at helping the child achieve his academic potential.[3] In addition, plaintiff noted that the older child had "reached adolescence" and wanted to spend more time with plaintiff, with whom he could explore his interests in history and science. Plaintiff also cited concerns with the children's hygiene, pertaining to regular nail trimming and dental checkups. Plaintiff asserted that the February 23, 2011 stipulated modification of parenting time provided for "both joint legal and physical custody" of the children. He further asserted that, "If the Court was to grant plaintiff's swap of parenting time schedules, because there is no material change in the amount of time the children spend in each household, and both parents would continue to share in providing love, support, and guidance of the minor children, the joint custodial environment would not be changed." Accordingly, plaintiff asserted that the relevant legal framework governing his

[3] Testimony at the evidentiary hearing on plaintiff's motion came from Catherine Ringey, Center Director for Sylvan Learning Center. No one from the child's school testified at the hearing regarding his academic progress or standing. Ringey admitted on cross-examination that the child was reading at his grade level, or close to it Defendant's attorney pressed her and noted that to be at his grade level equivalent, he should have scored a 4.8, however his assessment scored a 4.7 According to Ringey, this was still the equivalent of reading in the 50th percentile. Two exhibits were shown regarding math tests the child took in March and May of 2016. On the test in March he scored an 82. On the test in May, he scored a 92.

motion was set forth in *Shade v Wright*, 291 Mich App 17, 25-28; 805 NW2d 1 (2010), under which normal life occurrences can constitute a change in circumstances sufficient to proceed to an evidentiary hearing regarding whether the proposed modification of parenting time was in the children's best interests. Plaintiff stated, "If the Court grants Plaintiff Father's modification of parenting time, the minor children will attend The Midland Academy of Advanced and Creative Studies . . . beginning in the academic year 2016-2017."

In her response to plaintiff's motion, defendant disputed that the parties shared joint physical custody and that plaintiff's proposed change would not significantly change the amount of time the children spent in each household, and contended that plaintiff's proposed changes would alter the established custodial environments that the children have with each parent. Defendant also filed a motion to dismiss plaintiff's motion on the ground that, notwithstanding its label, it was actually a motion to change custody, and plaintiff had not made the threshold showing of a proper cause or change in circumstances as set forth in *Vodvarka*.

In its ruling from the bench, the trial court characterized this case as primarily a legal custody issue "about changing schools," and viewed the parenting time issue as subordinate to the school issue. In the words of the court, "The parenting time request is really if [the school change] is made how can parenting time . . . with each parent be accommodated." The trial court found that an established custodial environment existed with both parents and that changing the children's schools would not affect the established custodial environments. Accordingly, the court determined that, in order to succeed in his motion, plaintiff had to prove by a preponderance of the evidence that changing schools was in the best interests of the children. After addressing all of the statutory best-interest factors, MCL 722.23, and making findings on those relevant to the issue of changing schools, the trial court concluded that a preponderance of the evidence showed that changing schools was in the children's best interest. To accommodate this decision, the court granted plaintiff's motion to modify parenting time, reversing the existing parenting-time order so that plaintiff had 225 overnights per year, and defendant 140. In doing so, the trial court reduced the children's overnights with defendant by 85 days, or nearly three months.

II. ANALYSIS

A. STANDARD OF REVIEW

"All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue."[4] MCL 722.28; *Pierron*

[4] A court is not bound by what litigants choose to label their motions "because this would exalt form over substance." See *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Rather, courts must consider the gravamen of the complaint or motion based on a reading of the document as a whole. See *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229; 859 NW2d 723 (2014). As indicated above, the trial court characterized plaintiff's motion as primarily a legal custody issue "about changing schools"; plaintiff adopts this

v Pierron, 282 Mich App 222, 242; 765 NW2d 345 (2009); aff'd by *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010).

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009) (quotation marks and citations omitted).]

"The applicable burden of proof is a question of law that is reviewed de novo on appeal." *Pierron*, 282 Mich App at 243 (quotation marks and citation omitted).

B. RELEVANT LEGAL STANDARDS

The purpose of the Child Custody Act, MCL 722.21 *et seq.*, is to "promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Id.* at 243. Constant changes in the child's physical custody can wreak havoc on that child's stability, as can other orders that may significantly affect the child's best interests. The Child Custody Act authorizes the trial court to award custody and parenting time arising out of a child custody dispute and imposes a gatekeeping function upon the trial court to ensure the child's stability, as set forth in pertinent part in MCL 722.27:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by section 7a.1

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characterization on appeal. However, plaintiff moved to modify parenting time, primarily in response to the oldest child's preferences and stage of development and the youngest child's need for private tutoring. That the children would attend Midland Academy of Advanced and Creative Studies was presented as a consequence that would follow from the trial court's grant of plaintiff's proposed modification of parenting time. Regardless of how plaintiff wishes to characterize this matter, it entails a request that affects custody.

> (c) Subject to subsection (3)[5], modify or amend its previous judgments or orders for *proper cause shown or because of change of circumstances* until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. *The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.* The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. . . . [emphasis added].

1. PHYSICAL CUSTODY

Relevant to the case at bar, in a child custody dispute, MCL 722.27(1) allows a court to award custody to one or more of the parties and reasonable parenting time to the parties involved, both in accordance with the best interests of the child. Physical custody refers to a child's living arrangements. The Child Custody Act does not define "physical custody" or the often-used phrases "sole physical custody" and "primary physical custody." However, "[p]hysical custody" is defined under the Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq.*, as "the physical care and supervision of a child." MCL 722.1102(n). Caselaw frequently uses "sole custody" and "primary physical custody" to distinguish an award of custody to one parent from an award of joint physical custody.

In contrast to awarding sole or primary physical custody to one parent, a trial court has the option of awarding the parties joint custody, i.e., joint legal and joint physical custody, and the court must consider an award of joint custody, at the request of either parent. MCL 722.26a(1). The term "joint physical custody" stems from MCL 722.26a(7)(a), which addresses a situation where "the child resides alternately for specific periods with each of the parents." The term "joint legal custody" stems from MCL 722.26a(7)(b), which addresses a situation where "the parents[] share decision-making authority as to the important decisions affecting the welfare of the child."

The parties in the instant case agree and the trial court record makes clear that the consent judgment of divorce gave defendant physical custody of the children and plaintiff liberal parenting time, which at the time of the motion at issue, entailed the children spending 140 overnights per year with him. The parties shared joint legal custody, and thus, they shared decision-making authority as to the important decisions affecting the welfare of their children.

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[5] Subsection (3) is not relevant in the instant case.

2. PARENTING TIME

Parenting time is the time a child spends with each parent. "Whereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Shade*, 291 Mich App at 28-29. A court bases a parenting-time order on its determination of the best interests of the child, and grants parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The child has a right to parenting time unless the court determines on the record by clear and convincing evidence that parenting time would endanger the child's physical, mental or emotional health. MCL 722.27a(3). The trial court may consider the factors set forth in MCL 722.27a(7), along with the best interest factors provided in MCL 722.23, when granting parenting time. *Shade*, 291 Mich App at 31-32.

3. MODIFICATION OF PREVIOUS JUDGMENTS OR ORDERS OR ISSUANCE OF NEW ORDERS THAT AFFECT THE ESTABLISHED CUSTODIAL ENVIRONMENT

As set forth in MCL 722.27(1)(c), when seeking to modify a custody or a parenting-time order, the moving party must first establish proper cause or a change in circumstances before the court may proceed to an analysis of whether the requested modification is in the child's best interests. *Vodvarka* addresses the requisite standards for showing proper cause or a change in circumstances relative to requests to modify child custody. *Vodvarka*, 259 Mich App at 509-514. *Shade* addresses the requisite standards for showing proper cause or a change in circumstances relative to requests to modify parenting time. *Shade*, 291 Mich App at 28-30. Notably, where a proposed change in circumstances affects a child's established custodial environment, the applicable legal framework for analyzing the proposal is that set forth in *Vodvarka*. *Id.* at 27. An established custodial environment exists if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered." MCL 722.27(1)(c)

a. Proper Cause or Change of Circumstances Threshold

To establish a change in circumstances sufficient for a court to consider modifying a custody order, the movant must prove by a preponderance of the evidence that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 513. "[T]he evidence must demonstrate "something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514. "[T]o establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court." *Id.* at 512. As is the case with a change in circumstances, "[t]he appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being."

Id. If the movant does not establish proper cause or a change in circumstances, the trial court is prohibited from holding a child custody hearing:

> The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.* [*Id.* at 508-509 (quotation marks and citations omitted) (emphasis in *Vodvarka*).]

The purpose of this threshold showing "is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan*, 282 Mich App at 603.

As noted above, "[w]hereas the primary concern in child custody determinations is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents." *Id.* at 28-29; MCL 722.27a. Thus, although normal life changes typically are insufficient to establish the proper cause or change in circumstances required to proceed to consideration of a child custody order, unless the requested change would alter the established custodial environment, such changes can be sufficient for a court to consider modification of a parenting-time order. See *Shade*, 291 Mich App at 29, 30-31. However, "[i]f a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27. In other words, if a change in parenting time alters the established custodial environment, the normal changes that occur in a child's life "[would] not warrant a change in the child's custodial environment." *Id.* at 29.

b. Best Interests Analysis and Applicable Burden of Proof

If the movant seeking to change custody or parenting time successfully establishes proper cause or a change of circumstances under the applicable legal framework, the trial court must then evaluate whether the proposed change is in the best interests of the child by analyzing the appropriate best interest factors. In changes of custody, where the child has an established custodial environment with each parent, the movant must prove by clear and convincing evidence that the proposed change is in the best interests of the child. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). In a parenting-time matter, where the proposed change does not affect the established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child. *Shade*, 291 Mich App at 23. However, as indicated above, where the proposed parenting-time change alters the established custodial environment, the proposal is essentially a change in custody, and *Vodvarka* governs. *Shade*, 291 Mich App at 27; see also *Pierron*, 486 Mich at 92-93 ("[W]hen considering an important decision affecting the welfare of the child . . . a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case."). Thus, after

identifying the proper burden of proof, a court then proceeds to consideration of the best interest factors. As this Court explained in *Shade*:

> Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a([7]), are relevant to parenting time decisions. *Custody decisions require findings under all of the best interest factors, but parenting time decisions may be made with findings on only the contested issues.* [*Shade*, 291 Mich App at 31-32 (emphasis added).]

If the movant cannot meet the applicable burden of proof, the court shall not grant the proposed change. MCL 722.27(c).

C. APPLICATION

In light of the foregoing legal standards, we conclude that the trial court committed clear legal error in its choice and application of the legal framework under which to analyze plaintiff's motion. Notwithstanding the label plaintiff gave his motion or his inaccurate assertion that the proposed "swap" in parenting time would produce "no material change in the amount of time the children spend in each household," plaintiff's proposed modifications to parenting time effectively changed physical custody of the children from defendant to plaintiff.

The parties' judgment of divorce awarded legal custody to both parents, but physical custody of the children to defendant; the judgment did not award the parties joint physical custody.[6] As noted above, an award of physical custody primarily or solely to one party typically entails a situation in which the children receive physical care and supervision primarily from the parent awarded that status. Such is the case here. In accordance with the parties' agreement that defendant would be the children's primary physical custodian, the children in the case at bar have resided with and been cared for and supervised primarily by defendant since entry of the judgment of divorce. Thus, it defies the plain meaning of the word "primary," as well as rudimentary mathematics, to say that reducing the primary custodian's overnights with the children from 225, or nearly 62% of the calendar year, to 140, or approximately 38% of the calendar year, does not change primary physical custody. By proposing a reduction in the

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[6] Notwithstanding plaintiff's assertion to the contrary, the February 23, 2011, order does not expressly provide for joint physical custody; rather, it changes parenting time as indicated elsewhere in this decision, and provides that "all other orders remain in full force and effect." Further, the Clinton County friend of the court referee who heard defendant's December 2013 motion for a change in parenting time noted that the effective order gave the parties joint legal custody and defendant "primary physical custody" of the children. In addition, after defendant argued that plaintiff's motion to change parenting time would actually change custody, the trial court appears to have acknowledged as much, noting that the outcome of plaintiff's motion would "change the label that's in the prior order." The only order that provided any "label" regarding custody was the judgment of divorce. Presumably, therefore, the trial court meant that the successful outcome of plaintiff's motion would render him primary physical custodian of the children.

number of overnights the children spend with defendant to a distinct minority of the year, plaintiff was proposing a change in custody, regardless of the label he gave his motion. Accordingly, the proper legal standard under which to review his motion was the more burdensome and restrictive standard set forth in *Vodvarka*, not the less restrictive legal framework set forth in *Shade*, and the first issue the trial court had to consider was whether plaintiff established proper cause or a change in circumstances that met the standards set forth in *Vodvarka*.[7]

Even if we were to accept plaintiff's characterization of his motion as one simply to modify parenting time and change schools[8], we nevertheless would hold that the trial court committed reversible error by finding, against the great weight of the evidence, that plaintiff's proposed change would not affect the established custodial environment the children share with defendant and, consequently, by not analyzing the motion under the applicable legal framework set forth in *Vodvarka*. *Shade*, 291 Mich App at 27 ("If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate.").

This Court addressed a similar issue in *Pierron*, 282 Mich App 222 (2009). The trial court found *Pierron* to be "very close on point"; unlike the trial court, however, we find that

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[7] Plaintiff admits that normal life changes are not sufficient to meet the *Vodvarka* threshold when it comes to a change in physical custody. Defendant accurately questions whether plaintiff's evidence regarding the younger child's academic performance and the older child's shared interests with plaintiff meets the *Vodvarka* standard for proper cause or a change in circumstances.

Contrary to our dissenting colleague's representation in Section VI of his opinion, the younger child was not performing at the 29th and 27th percentile in reading and mathematics, respectively, when the issue of proper cause or a change of circumstances was before the trial court. Rather, those figures were calculated by Sylvan Learning Center when first assessing the child in the second half of third grade. Both parents thereafter undertook various efforts to improve their child's academic performance. His performance levels at the time of the evidentiary hearing after fourth grade placed him at the 50th percentile in reading and 64th percentile in math, according to Sylvan Learning Center. Plaintiff was suggesting that he could provide even more tutoring if the child lived with him, and the goal would be for the child to become college ready upon graduation.

[8] We find it bears repeating that a party's label is not dispositive of the substance of that party's motion. Otherwise, parties would simply label change of custody matters as a change in parenting time in order to benefit from the lower threshold set forth in *Shade*. In no world can a change from 225 overnights to 140 overnights be considered simply a change of parenting time and not a change in physical custody where the parties do not share joint physical custody. And if they do share joint physical custody, a reduction from 225 overnights to 140 overnights (85 days), would likely affect the established custodial environment, much like plaintiff argued when opposing defendant's December 2013 motion with regard to a reduction of 52 days in his parenting time.

Pierron supports defendant's position, not plaintiff's. In *Pierron*, the defendant-mother had sole physical custody of the minor children and the parties shared joint legal custody. *Id.* at 225-226. At the time of the judgment of divorce, both parents lived in Grosse Pointe Woods, and the children attended Grosse Pointe Public Schools. *Id.* at 226. When the defendant later purchased a house in Howell and sought to enroll the children in Howell Public Schools, the plaintiff-father moved to prevent the change in school districts on the ground that it would significantly modify the children's established custodial environment. *Id.* at 227-229.

Subsequent to a six-day hearing, the circuit court found that the children had established custodial environments with both parents and that the defendant's removal of the children to Howell Public Schools would change the established custodial environment of the children. *Id.* at 230-232. The circuit court determined that, because the change in schools would alter the established custodial environment, the defendant had to prove by clear and convincing evidence that such change was in the children's best interests. *Id.* at 232. After conducting a best-interest analysis, the trial court found that the defendant had not met her burden of proof and, therefore, granted the plaintiff's request that the children remain enrolled in Grosse Pointe Public Schools. *Id.* at 242. The defendant appealed this ruling.

On appeal, this Court agreed with the trial court that the children had an established custodial environment with both parents, but concluded that the court erred "when it found that the proposed change of school districts would alter the children's established custodial environment." *Id.* at 248. The Court pointed out at the outset that primary physical custody would not change in order to accommodate the change of schools:

> We first note that the proposed change of school districts *would not have changed the actual custody arrangements* in this case. *Defendant has at all times had primary physical custody* of the children since the parties' divorce, and plaintiff has seen and interacted with the children only during his parenting time. Enrollment of the children in the Howell Public Schools *would not alter this arrangement in any way—defendant would still maintain primary physical custody*, and plaintiff would still be free to exercise liberal and reasonable parenting time just as he had done before the change of school districts. [*Id.* at 248-249 (emphasis added).]

Although the Court acknowledged that the change "might require minor modifications to [the] plaintiff's parenting time schedule," it did not rise to the level of affecting the children's established custodial environment with the plaintiff. *Id.* at 249. The Court explained why as follows:

> Since the divorce, defendant has always been the primary physical custodian of the minor children. In contrast, plaintiff has seen the children and exercised parenting time only when his personal and work schedules have accommodated it. Enrolling the children in the Howell Public Schools quite simply would not alter this arrangement. Plaintiff would still be free to exercise parenting time with the children after school and on weekends and holidays. Such a schedule would not be materially different than plaintiff's current parenting time schedule. [*Id.* at 250.]

As such, the defendant was required only to prove by a preponderance of the evidence that such a change was in the best interests of the children, *id.*, and even then, only the best interest factors relevant to a school change were necessary to evaluate, *id.* at 250-253. The Michigan Supreme Court granted the plaintiff's application for leave to appeal and affirmed this Court's analysis and conclusion regarding whether the proposed change in schools would affect the plaintiff's established custodial environment. *Pierron*, 486 Mich at 86-87.

Pierron supports the conclusion that a substantial modification of parenting time would alter the established custodial environment that the children have with defendant. Whereas minor modifications that leave a party's parenting time essentially intact do not change the party's established custodial environment, see *id.* at 87, significant changes do. See also *Rains v Rains*, 301 Mich App 313, 323-324; 836 NW2d 709 (2013) (indicating that even where parents have joint physical custody and have established a "joint custodial environment," changes that substantially reduce the time a parent spends with a child would potentially cause a change in the established custodial environment); *Shade*, 291 Mich App at 25-28 (where a change in parenting time did not affect the established custodial environment because it left the parties with approximately the same number of parenting time days); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008) (holding that a modification of "parenting time" that would relegate a parent who was equally active in the child's life to the role of a "weekend parent" would amount to a change in the established custodial environment with that parent); *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004) (indicating that modification of parenting time from nearly equal parenting time to one party having parenting time during the school year and the other having parenting time during the summer "necessarily would amount to a change in the established custodial environment").

In the instant matter, the plaintiff's proposal would reduce the children's overnights with defendant from 225 per year to 140 per year; that 85-day reduction is a nearly 40% decrease in the time the children would spend with defendant. She would spend her time with the children primarily on the weekends and in the summer. "If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27. Accordingly, even if one could construe plaintiff's motion as simply one modifying parenting time, the *Vodvarka* framework would still apply because the proposed changes would alter the children's established custodial environment.

Plaintiff attempts to rebut defendant's argument about being relegated to a weekend/summer parent by contending that, as shown in *Pierron*, the distance between defendant's and his home and the school need not impact the equation, and here, the parties have lived a significant distance from one another for years. Plaintiff points out that the distance change in *Pierron* was "far more substantial, yet it was allowed." However, the change in *Pierron* was allowed because, notwithstanding the distance from Grosse Pointe Woods to Howell, custody did not change and the change in schools necessitated only minor modifications in plaintiff's exercise of parenting time, not the nearly 40% reduction in defendant's parenting time called for here.

Plaintiff also argues that the ten weeks of parenting time during summer vacation that his proposal allows defendant "has the effect of preserving and promoting the custodial environment that the children have with [defendant]." However, plaintiff's emphasis on the long stretch of

summer parenting time defendant would have with the children does not minimize the fact that defendant loses more than 12 weeks of parenting time under plaintiff's proposal. Further, central to the children's established custodial environment with defendant was the support and guidance defendant gave and the material needs she met relative to the children's school attendance. To the extent that plaintiff's proposed modification of parenting time not only substantially reduced the time defendant spent with the children, but also the character of her interaction with the children, the proposal significantly alters the children's established custodial environment with defendant. Finally, plaintiff argues that the determinative factor is not the reduction in defendant's day-to-day contact with the children, but the "record showing that the children's best interests would be served by having plaintiff take over the day-to-day management of the children's education that determined the result in this case." This argument misses the point that, before the court can even consider whether a proposed custodial change is in the best interests of the children, it must first determine whether the movant has made the required showing of proper cause or a change in circumstances. In this case, under either a custody analysis or a parenting time analysis, the applicable legal framework for determining whether the threshold showing has been made is that found in *Vodvarka,* and the trial court erred when it incorrectly applied the law in this instance. See *Shade*, 259 Mich App at 27.

III. RESPONSE TO THE DISSENT

We agree with the dissent on a number of issues. We agree with the dissent's explication of the law governing child custody and parenting time decisions, that the Legislature's intent is to provide for the best interests of the children, which includes preventing unwarranted changes in custody and parenting time. We also agree that a grant of physical custody is irrelevant to the factual question of whether and with whom a child has an established custodial environment. Additionally, we agree that the trial court properly decided that the children at issue have an established custodial environment with each parent. However, we disagree on two key issues.

First, without imputing any improper intention, we see in plaintiff's motion an attempt to change primary physical custody under the guise of a change in parenting time. This attempt may arise from plaintiff's interpretation of the February 23, 2011 stipulated modification of parenting time as a stipulation to joint legal and joint physical custody. However, as we pointed out in the main opinion, defendant disputes this interpretation, and the referee who heard defendant's December 2013 parenting-time motion understood the judgment of divorce to continue to govern the custodial arrangements. Nevertheless, because the proposed change is essentially a change in physical custody, the first question is whether plaintiff has met *Vodvarka's* more stringent threshold showing to proceed to a best interests hearing.

Second, even if we did view the proposed change as merely a change in parenting time (that also entailed a move from DeWitt to Midland), the caselaw cited in our decision compels us to conclude that a change of the magnitude suggested affects the children's established custodial environment with both parents, again making *Vodvarka* the proper legal framework for resolving the dispute. Sometimes, judges must agree to disagree; this case presents just such an occasion.

IV. CONCLUSION

The trial court committed "clear legal error" in its selection and application of the governing law. Because the effect of granting plaintiff's motion was a change in physical custody, the trial court should have applied the legal standards set forth in *Vodvarka* to determine

whether "proper cause" or a "change of circumstances" was sufficient to reopen the custody issue. Even if the trial court had been correct in treating plaintiff's motion as one to modify parenting time, because the proposed modification would modify the children's established custodial environment, *Vodvarka* remained the proper threshold standard before evaluating whether such proposed modification was in the best interests of the children. *Shade*, 259 Mich App at 27. In light of these errors, we vacate the trial court's order and remand for further proceedings in compliance with the statutory requirements of the Child Custody Act and relevant caselaw regarding a change of custody. Assuming on remand that the trial court finds by a preponderance of the evidence that plaintiff has met the *Vodvarka* standard, plaintiff must still prove by clear and convincing evidence that plaintiff's proposed change is in the best interests of each of his children.[9] *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (noting, "[t]his higher standard applies when there is an established custodial environment with both parents"). In doing so, the court must evaluate all of the best interest factors set forth in MCL 722.23, and not just in relationship to the contested issues. See *Shade*, 291 Mich App 31-32.

Vacated and Remanded. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs. MCR 7.219.

/s/ Jane M. Beckering
/s/ Michael J. Kelly

[9] The Court further stresses that the best interests of each child must be considered before the child's established custodial environment may be changed. Although the trial court may certainly take into account the siblings' desire to be with one another, it may not change one child's established custodial environment based solely on the best interests of the other child. See MCL 722.27(1)(c) ("The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.")

STATE OF MICHIGAN

COURT OF APPEALS

JOHN ALLEN LIEBERMAN,

Plaintiff-Appellee,

v

KIMBERLY ANN ORR, formerly known as KIMBERLY ANN LIEBERMAN,

Defendant-Appellant.

FOR PUBLICATION
March 7, 2017

No. 333816
Clinton Circuit Court
LC No. 13-024442-DM

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

O'CONNELL, J. (*dissenting*).

The majority's visceral response to a major change in the parties' parenting time is understandable, but on a close scrutiny, I conclude the trial court's analysis of the facts, the law, the process, and its application of the law in this case was faultless. The majority opinion frames this case as involving a change of custody, but this is not a change of custody case: this is a factually complex parenting time case in which the trial court ultimately held the children's educational needs paramount to the parents' dispute over which of them should have more time with the children.

In other words, the trial court in this case did exactly what it should do when faced with a complex family law issue—it followed the procedures this Court has outlined to resolve such disputes and, in the end, placed the children's best interests first. I respectfully dissent from the majority's conclusion that the trial court committed a clear legal error in the framework it applied to this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant-mother, Kimberly Ann Orr, and plaintiff-father, John Allen Lieberman, divorced in 2008. Their consent judgment granted Orr sole physical custody of their two children, granted joint legal custody to both parties, and granted Lieberman a liberal amount of parenting time. In 2010, the trial court allowed Orr's motion to change the children's residence from their previous home in East Tawas, Michigan. Orr moved to DeWitt, Michigan, and Lieberman moved shortly thereafter to Midland, Michigan.

Parenting time changed after the parties moved. In February 2011, the parties stipulated to Lieberman having parenting time three weekends a month and during the majority of the

children's summer vacation. As a result, Lieberman received 140 overnights a year and Orr received 225 overnights a year. In December 2013, Orr filed a motion for a change in parenting time. Her motion requested a modification of parenting time to expand her summer and weekend time with the minor children.[1]

A referee heard the motion on January 28, 2014. The referee found that the children had an established custodial environment with both parents. Following Orr's objections, the trial court held a hearing on March 20, 2014. After considering the parties' admissions and the stipulated parenting time order from 2011, the trial court found that the children looked to both parents for guidance, discipline, the necessities of life, and parental comfort. Accordingly, it agreed with the referee's finding that the children had an established custodial environment with both parents.[2]

In May 2016, Lieberman moved to change the children's school to Midland Academy. He alleged that the youngest child began struggling in school in 2014 and his fluency scores in reading and math approached the cut-off point for risk. While the child improved with tutoring over the summer of 2015, he again began falling behind during the 2015-2016 school year. Lieberman sought to facilitate the change by "swap[ping] the current parenting time schedule" so that the children would reside primarily with Lieberman during the school year and with Orr during most weekends and the majority of summer vacation.

Orr moved to dismiss the petition, alleging that Lieberman had not stated proper cause or a change of circumstances sufficient to justify modifying the children's parenting time. The trial court ruled that the younger child's issues with school performance and both children's issues with hygiene might constitute a proper cause or change of circumstances sufficient to warrant revisiting the parenting time order. The trial court allowed the case to proceed to a hearing, stating that it would make its ruling regarding change of circumstances after the parties presented proofs.

The parties presented evidence that both are extensively involved in the children's lives. Lieberman testified that he and the children enjoyed visiting museums, fishing, mountain biking, and kayaking together. Orr testified that she and the children enjoyed fishing, boating, camping, and horseback riding together. Both parties testified about their involvement in the children's schooling, both parties presented evidence that the children discussed daily concerns and life events with them, and both parties presented evidence of supportive and nurturing home environments.

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[1] It could be considered a harbinger of things to come that Orr complained of the burdensome responsibility of day-to-day parenting, including assuring that the children's school assignments and homework were completed, and sought more fun and recreational time with the children.

[2] At oral argument and in the briefs filed with this Court, the parents conceded that the children have an established custodial environment with both of them. As I will discuss in Section V, this is an important development that the majority overlooks.

Both parties also testified that after the youngest child began to struggle with reading, they assisted. Lieberman testified that after the younger child's test scores began falling, he engaged Sylvan Learning Center for educational assistance. Catherine Ringey, the Director for Sylvan Learning Center in Midland, testified that some children do better with more individualized instruction. According to Ringey, Sylvan assessed the younger child when he was in third grade and the child initially scored in the 29th percentile for reading and the 27th percentile for math. Sylvan recommend tutoring the child as much as possible.

By the end of the summer of 2015, the child was in the 54th percentile for reading and "his confidence soared." Ringey characterized the child's improvement as impressive, but she wanted the child to advance to around the 80th percentile to be competitive "through school and in college and jobs . . . ." According to Lieberman, he reached out to Orr about enrolling the child in Sylvan during the school year, but Orr did not do so.

Orr testified that she did not trust Sylvan's for-profit nature and did not enroll the child in tutoring during the school year because he was close to reaching his benchmark proficiencies. Instead of paid tutoring, Orr practiced reading and math with the child at home and asked the child's teacher to enroll him in a special class. Ringey testified that as a result of not receiving tutoring during his fourth grade year, the child's reading score dropped to the 50th percentile because he was not progressing at the same rate as his peers. The child was also eventually enrolled in math tutoring, and his math percentile score improved from the 27th to the 63rd percentile.

Lieberman testified that he was seeking to modify parenting time so that he could enroll the children in Midland Academy because it has small class sizes, a focus on arts, sciences, and extracurricular activities, and creates a curriculum for each individual child. Orr testified that uprooting the children from their current school environment was unreasonable and she was concerned that Midland Academy did not offer extracurricular programs that the older child enjoyed.

Following the hearing, the trial court ruled that the case was a parenting-time case that was primarily about changing schools. It found that the children shared their concerns with both parents, and both parents provided the children with material needs and supported them in their activities, and

> the children in this case have two great parents, and I'm very impressed with the extended families and step families, it seems like these kids have a lot of people that love them, a lot of people they feel comfortable around.

Accordingly, it found that the children had an established custodial environment with both parents. It also found that the proposed modification to parenting time would not affect the children's relationships with their parents.

On that basis, the trial court made its findings regarding the children's best interests to the preponderance of the evidence standard. Considering the best interest factors, it found that the parties were equal in most factors. However, it found that the capacity to give the children guidance, and the home, school, and community record of the children favored Lieberman

because he was more proactive in remedying the younger child's academic difficulties. The trial court found that Orr's more relaxed parenting style may have contributed to the children's educational and hygiene issues. Finally, the trial court found that the parties' willingness to facilitate a close relationship with the other parent slightly favored Lieberman.

Ultimately, the trial court found that (1) a proper cause or change of circumstances exist, (2) a preponderance of the evidence supported that changing the children's school to Midland Academy, and (3) changing the parenting time schedule to accommodate the change in school was in the children's best interests. The trial court switched Lieberman and Orr's parenting time schedules so that Orr received 140 overnights a year, primarily during weekends and the summer, and Lieberman received 225 overnights a year, primarily during the school year.

II. JURISDICTION

As an initial matter, this Court lacks jurisdiction to hear this case as an appeal of right. Orr has appealed an order modifying parenting time and addressing school enrollment. In the recent case of *Ozimek v Rodgers*, ___ Mich App ___, ___; ___ NW2d ___ (2016); slip op at 7, this Court concluded that neither school enrollment nor parenting time orders are "final orders" appealable by right.[3] The order in the present case is only appealable by leave, and because this Court has not granted leave to appeal, we do not have jurisdiction to hear this case.

This case is a prime example of why parenting-time orders are and should be appealable by leave only. Public policy favors prompt and final adjudication of custody disputes. See MCL 722.28. Sagas about parenting time are best resolved by judges on the family division of the circuit court, where the same judge consistently rules on matters concerning a single family, allowing trial court judges to become intimately familiar with the facts and situations of each family, the best interests of the children, and the impact of the changes and the parties' disputes on the stability of the children's environment. In this case, the saga has taken place over 9 years and has involved a fluid, changing parenting-time situation. The trial court is in the best position to end the struggle for control between the parents by ruling on what is in the best interests of the children from its outside, yet intimately familiar, seat.

III. STANDARDS OF REVIEW

This Court must affirm custody orders "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. The trial court commits clear legal error "when it incorrectly chooses, interprets, or applies the law." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). We review de novo the trial court's determinations on questions of law. *Id.*

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[3] The Michigan Supreme Court has recently granted arguments on leave to appeal this case. *Ozimek v Rodgers*, ___ Mich ___ (2017).

We review the trial court's decision regarding whether a party has demonstrated proper cause or a change of circumstances to determine whether it is against the great weight of the evidence. *Id.* We also review the trial court's finding regarding the existence of an established custodial environment under the same standard. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). A finding is against the great weight of the evidence if the evidence clearly preponderates in the other direction. *Corporan*, 282 Mich App at 605.

IV. LEGAL STANDARDS

Before making any decision that would affect the welfare of the child, the trial court must determine whether the decision would modify the child's established custodial environment. *Pierron*, 486 Mich at 85. Not every parenting time adjustment will modify a child's established custodial environment:

> While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. [*Pierron*, 486 Mich at 86 (citation omitted).]

A child has an established custodial environment with both parents if the child "looks to both the mother and father for guidance, discipline, the necessities of life, and parental comfort." *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008).

When determining whether and with whom the child has an established custodial environment, the focus is on the child's circumstances, not on the order or orders that created those circumstances. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). Thus, "[t]he trial court's custody order is irrelevant to this analysis." *Id.*

A trial court may only amend its previous judgments or orders concerning child-custody determinations if the moving party shows a proper cause or change of circumstances. *Corporan*, 282 Mich App at 603. The existence of proper cause or a change of circumstances is a threshold consideration that the trial court must resolve before revisiting a custody order. *Id.* The trial court may (but need not) hold an evidentiary hearing to determine whether the circumstances rise to the level of a proper cause or change of circumstances. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 514-516; 675 NW2d 847 (2003); *Corporan*, 282 Mich App at 605. The purpose of this framework is to "erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Vodvarka*, 259 Mich App at 509 (quotation marks and citation omitted).

A proper cause exists if there are "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511. A change of circumstances warrants modifying a child's custodial environment only if, "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a

significant effect on the child's well-being, have materially changed." *Id.* at 513. Normal life changes, whether positive or negative, are not sufficient to warrant such a change. *Id.* However, when a proposed parenting-time change does *not* modify the child's custodial environment, normal life changes may constitute a sufficient change of circumstance to warrant the parenting-time change. *Shade v Wright*, 291 Mich App 17, 30-31; 805 NW2d 1 (2010).

If a proposed modification would change the child's established custodial environment, the moving party must show by clear and convincing evidence that the change is in the child's best interests. *Pierron*, 486 Mich at 92. However, if the proposed modification does not change the child's custodial environment, the moving party must show by a preponderance of the evidence that the change is in the child's best interests. *Id.* at 93.

V. THE MAJORITY'S FLAWED ANALYSIS

It is a legal adage that hard cases make bad law. The root of this adage is particularly applicable to this case:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. [*Northern Securities Co v United States*, 193 US 197, 400-401; 24 S Ct 436; 48 L Ed 679 (1904) (Justice HOLMES, dissenting).

In this case, the majority's instinct that flipping parenting time from favoring Orr to favoring Lieberman must be wrong has led it to shortcut through the proper legal framework with the pressure of a hydraulic saw.

First, the majority's method for reaching the result it seeks is to conflate a grant of physical custody with a child's custodial environment. In doing so, the majority ignores that the 2008 custody order has no bearing on whether and with whom the children have an established custodial environment. The trial court's custody order is *irrelevant* to determining the children's established custodial environment. *Hayes*, 209 Mich App at 388. The focus is on the children's actual environment, and "it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Id.* at 388-389.

In reviewing the legal framework laid out in Section IV, one will notice that whether and to whom the trial court initially granted sole or primary physical custody is found nowhere within it. Indeed, one can read Judge Murray's excellent decision in *Vodvarka* until the cows come home and one will not find the phrase "physical custody" in that opinion. It is because, as this Court stated in *Hayes* and many times since, the *custody order* is irrelevant: the controlling consideration is the child's *custodial environment* at the time of the hearing.

In order to reach its desired result, the majority changes the paradigm that all courts use to resolve parenting time disputes. It casts out the courts' primary goal of minimizing disruptive

changes to the children's custodial environments. The majority then disregards the numerous court proceedings which have occurred since that divorce judgment. Traditionally, sole custody would result in one parent having significantly more overnights and joint custody would result in an approximately equal measure, but as these matters go, these labels lose meaning over time. Each situation is different and, because of modifications to parenting time, each situation is fluid. To whom the children look for love, guidance, and support is not determined by an initial custody label.

For this reason, the majority's conclusion that the trial court committed a clear legal error in evaluating the initial change of circumstances under *Shade* rather than under *Vodvarka* is fatally flawed. *Shade* provides that normal life changes may constitute a sufficient change of circumstances to warrant modifying parenting time but not the children's custodial environment. *Shade*, 291 Mich App at 30-31. *Vodvarka* provides that the children's conditions must have materially changed to warrant a parenting time modification that will affect the children's custodial environment. *Vodvarka*, 259 Mich App at 511. In either case, it is not the children's *physical custody* that is of concern, it is the children's *custodial environment.*

The parties do not dispute that the children have an established custodial environment with both parents and have had that environment for some time. And contrary to the majority's conclusion, for reasons that shall be discussed, the resulting change to parenting time in this case will not alter the children's established custodial environment. *Vodvarka* does not apply, and the trial court did not err by failing to apply it.[4]

Second, the majority's conclusion that an 85-day change in the number of parenting-time overnights must necessarily change the children's custodial environment is unsupported. The majority neatly sidesteps this issue by treating it as a legal issue when it is a factual issue. See *Pierron*, 486 Mich at 85 (stating that we review the trial court's decisions regarding whether and with whom the child has an established custodial environment as an issue of fact). As the attorneys illustrated through their vehement opposition at oral argument to setting a specific number of days as a threshold, no arbitrary number of days will determine to whom children look for love, guidance, and necessities.[5]

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[4] Even if *Vodvarka* did apply, the trial court properly progressed to an evidentiary hearing. The trial court may hold an evidentiary hearing on the threshold question of whether a proper cause or change of circumstances exists to warrant a change of custody. See *Vodvarka*, 259 Mich App at 514-516; *Corporan*, 282 Mich App at 605. The trial court's decision to hold a hearing was appropriate in this case, where it was unclear whether the child's educational struggles rose to the level of a normal life change or a major life change, and where it was unclear whether the parenting time change would alter the children's custodial environment.

[5] The majority's conclusion leads me to question what number of days automatically transforms a parenting time change into a change of custodial environment—10 days, 20 days, 50 days, 85 days? While developing a cutoff might be helpful to some family law practitioners, such a mathematical approach would take into account only one factor of the multifaceted, factually complex issues of custodial environment. Such an approach would thus be extremely unwise.

The children had established custodial environments with both parents when the 140/225 day split favored Orr. The trial court found that the children would continue having established custodial environments with both parents when the 140/225 day split favored Lieberman. It based its finding on the facts that both parents are active parents, devoted to these children, and communicate with them regularly regardless of at whose house the children are staying overnight. While major changes in parenting time *may* result in a change to the children's established custodial environment, the majority treats this possibility as conclusive in this case solely on the basis that the change here involves 85 overnights. In doing so, it ignores the trial court's specific factual findings, when those findings were not against the great weight of the evidence.

VI. MY ANALYSIS

In analyzing these issues under the legal framework I have laid out in Section IV of this opinion, I conclude that the trial court's decision was legally sound and its factual findings were not against the great weight of the evidence.

A. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Orr first contends that the trial court erred by finding that the youngest child's difficulties in school constituted a proper cause or change of circumstances sufficient to revisit the children's custody order. I disagree.

In *Corporan*, this Court considered whether a child's declining grades could constitute a change of circumstances that would warrant revisiting a custody order. *Corporan*, 282 Mich App at 608. In that case, the child had mixed grades in different subjects and was not in danger of failing any subject. *Id.* at 608-609. We concluded that the trial court's determination that a minor decline in the child's grades was not a material change of circumstances and was not against the great weight of the evidence in that case. *Id.* at 609.

Corporan does not stand for the proposition that a child's difficulties in school can never constitute proper cause or a change of circumstances. To the contrary, whether a child's academic struggles constitute a proper cause or change of circumstances sufficient to change a child's parenting time or custodial environment will depend on the magnitude of the child's difficulties and the effect those difficulties will have on the child's future. The trial court is uniquely equipped to resolve such factually intricate questions.

In this case, Lieberman alleged that the younger child was becoming deficient in foundational skills—reading and mathematics—that Ringey testified could pose a threat not only to the child's future educational success, but to the child's successes into adulthood.[6] The child

Unfortunately, by determining that an 85-day change necessarily alters an established custodial environment, the majority opinion has begun to construct the very mathematical cutoff that the litigants' attorneys advised against.

[6] While hygiene difficulties were also a factor in this case and played a part in determining the children's best interests, the parties and trial court clearly focused on the children's educational difficulties as its basis for altering parenting time.

was nearing the cutoff point for academic risk and was at the 29th and 27th percentiles, respectively, among students his age. Unlike the child in *Corporan*, the child in this case was at a serious educational risk from a deficiency that posed a threat to the child's long-term success. In my opinion, the child's academic difficulties were serious enough that the trial court would have been warranted in finding that they rose to the level of significantly affecting the child's wellbeing under *Vodvarka*.[7] I conclude that under the facts of this case, the trial court's decision to revisit the parenting time order was not against the great weight of the evidence.

B. ESTABLISHED CUSTODIAL ENVIRONMENT VERSUS PHYSICAL CUSTODY

Orr next contends that the trial court erred when it found that the children had an established custodial environment with both parents because the parties' divorce order granted her sole physical custody. According to Orr, this fact alone results in a change of custody. I could not more vehemently disagree. As I discussed in Section IV of this opinion, a parenting time modification does not necessarily change a child's established custodial environment.

In this case, both parents provided the children with loving and supportive home environments. Both parents engaged the children in activities that suited the children's interests. Both parents discussed how the children came to them with difficulties, to seek comfort and advice. The children completed school assignments at both homes, and both parents were significantly involved in the children's education. I conclude that the trial court's finding that the children had an established custodial environment with both parents was not against the great weight of the evidence.

Second, Orr contends that the trial court erred when it found that modifying the children's parenting time would not alter their established custodial environment. Again, I disagree.

While a change in parenting time from 225 overnights to 140 overnights is certainly at the outer edge of a parenting time change (and to some practitioners and at least two appellate judges, beyond a cutoff), I cannot say that the trial court's finding that it would not change the children's established custodial environment was against the great weight of the evidence. Orr provided no evidence to support her assertions that this change would alter how the children look to her for guidance, necessities, and support. To the contrary, Lieberman was able to maintain an established custodial environment with the children while having exactly the same parenting time schedule to which Orr objects. And the record indicates that both parents have striven to maintain close bonds with their children, provide them with physical comforts, engage them in their interests, and counsel them when they have difficulties, and intend to continue to do so in the future. There is no evidence to support that the altered parenting time schedule would change to whom the children look for guidance, support, and necessities. Accordingly, I conclude that the trial court's finding was not against the great weight of the evidence.

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[7] My conclusion would render moot the question of whether the trial court properly applied *Vodvarka* or *Shade*. Under either standard, the trial court properly revisited the children's parenting time.

C. THE CHILDREN'S BEST INTERESTS

Orr contends that the trial court clearly erred by applying the preponderance of evidence standard to the children's best interests instead of the clear and convincing evidence standard. I disagree.

Orr bases her argument on her previous assertion that the trial court improperly found that a parenting time modification would not change the children's established custodial environment. However, because I have rejected that argument, the preponderance of the evidence standard was the appropriate standard. The trial court considered all the relevant best-interest factors in reaching its conclusion. I conclude that the trial court applied the proper standard when determining the children's best interests.

VII. CONCLUSION

Under the unique set of facts of this case, the trial court concluded that while both Lieberman and Orr were excellent parents, a change in schools was necessary to accommodate the struggling child's educational needs. To change schools, the trial court was required to flip parenting time in favor of Lieberman. While the flip appears to be at the outer edge mathematically speaking, standing alone, it provides no basis to overturn the trial court's finding that this change would not alter the children's custodial environment. I cannot conclude that the trial court committed clear legal error in its framework, that its decision was against the great weight of the evidence, or that it abused its discretion in its parenting time decision. The trial court made a difficult, but correct, decision.

I would affirm the trial court's supported and well-reasoned decision.

/s/ Peter D. O'Connell